(13)

No. 01-270-CSX Title: Yellow Transportation, Inc., Petitioner
v.
Michigan, et al.

Docketed: August 14, 2001 Court: Supreme Court of Michigan

Entry	Date	Proceedings and Orders
	Aug 13 2001	Petition for writ of certiorari filed. (Response due September 13, 2001)
	Sep 13 2001	Brief amici curiae of American Trucking Associations, Inc., et al. filed.
	Sep 13 2001	Brief of respondents Michigan, et al. in opposition filed.
	Sep 19 2001	DISTRIBUTED for Conference of October 5, 2001
	Sep 24 2001	Reply brief of petitioner Yellow Freight System, Inc. filed.
	Oct 9 2001	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jan 2 2002	REDISTRIBUTED for Conference of January 18, 2002
	Jan 2 2002	Brief amicus curiae of United States filed.
	Jan 22 2002	Petition GRANTED. limited to the following question: Whether the Michigan Supreme Court erred in holding that, under 49 U.S.C. Sec. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. Sec. 14504(c)(2)(B)(iv)(III) (Supp. V 1999), only a State's 'generic' fee is relevant to determining the fee that was 'collected or charged as of November 15, 1991.' SET FOR ARGUMENT October 7, 2002. **********
	Jan 23 2002	Supplemental brief of respondents Michigan, et al. filed.
	Jan 23 2002	LODGING consisting of ten copies of Procedures Manual for Single State Registration System received from counsel for the respondents and distributed twenty.
	Feb 28 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including April 5, 2002.
	Apr 5 2002	Brief amicus curiae of United States filed.
	Apr 5 2002	Joint appendix filed.
	Apr 5 2002	Brief of petitioner Yellow Freight System, Inc. filed.
	Apr 5 2002	Brief amici curiae of American Trucking Associations, Inc., et al. filed.
	May 8 2002	Brief of respondents Michigan, et al. filed.
	May 10 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	May 30 2002	Application (01A938) of petitioner for an extension of time within which to file the reply brief on the merits, submitted to Justice Stevens.
	May 30 2002	Application (01A938) granted by Justice Stevens extending the time to file until June 24, 2002.
	Jun 17 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jun 24 2002	Reply brief of petitioner Yellow Freight System, Inc. filed.
	Aug 1 2002	CIRCULATED.

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No. 01-270-CSX

Entry	Date	Proceedings and Orders
	Aug 23 2002	Record filed.
	Sep 24 2002	Record filed.
	Oct 7 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC,
Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, AND JOHN L. O'DONNELL,
Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress in 1991 directed the Interstate Commerce Commission ("ICC") to prescribe new and more simplified standards under which states are permitted to charge fees for registration of interstate motor carrier operations. 49 U.S.C. § 11506(c)(1) It specified that these new standards "shall establish a fee system" that "will result in a fee for each participating State that is equal to the fee *** that such State collected or charged as of November 15, 1991". 49 U.S.C. §11506(c)(2)(B)(iv)(III) In issuing these standards, the ICC specifically ruled that states must apply reduced fee levels based on so-called reciprocity arrangements between states in determining the November 15, 1991 fee level. The D.C. Circuit held on appeal that "the [ICC] was correct in concluding that the plain language of the statute precludes" allowing states to charge fees higher than those in place under reciprocity arrangements.

Under reciprocity arrangements in place on November 15, 1991, Michigan had reduced its registration fee for vehicles plated in Illinois from $10 per vehicle to zero. Expressly disregarding the ICC, a divided Michigan Supreme Court deemed Michigan's reciprocity arrangement with Illinois to be "irrelevant" to the determination of the fee collected or charged on November 15, 1991, and accordingly rejected petitioner's challenge to assessment of a $10 per vehicle fee for Illinois-plated vehicles.

The question presented is whether the Michigan Supreme Court erred in disregarding the ICC's determination and ruling that, notwithstanding 49 U.S.C. §11506(c)(2)-(B)(iv)(III), States may charge registration fees in excess of those charged and collected under reciprocity arrangements in force as of November 15, 1991.

RULE 29.6 STATEMENT

Petitioner Yellow Freight System, Inc. is a wholly owned subsidiary of Yellow Corporation, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Yellow Freight System, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (Pet. App., 2a-22a) in reported at 464 Mich. 21, 627 NW2d 236. The opinion of the Michigan Court of Appeals (Pet. App., 23a-38a) is reported at 231 Mich. App. 194, 585 NW2d 762. The opinion of the Michigan Court of Claims (Pet. App. 39a-42a) is unreported.

JURISDICTION

The order of the Michigan Supreme Court reversing the judgment of the Michigan Court of Appeals was entered May 15, 2001. The opinion of the Michigan Supreme Court was filed on the same date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the Appendix. The statutes involved are 49 U.S.C. §11506 (Pet. App. 99a-101a) (since recodified as 49 U.S.C. §14504) and Mich. Comp. Laws § 478.7(4), (2001). (Pet. App. 102a-103a) The Constitutional provision involved is the Commerce Clause, Article I, Section 8, Clause 3.

STATEMENT

Petitioner Yellow Freight System, Inc. is one of the nation's largest interstate trucking companies. It brought this action in Michigan state courts to enforce its federal

constitutional and statutory right to a refund of fees in excess of the maximum amount which Congress has allowed states to charge for the registration of for-hire motor carrier vehicles operating in interstate commerce. Although Congress had been allowing the states to charge such fees up to stated maxima since the 1960's, the fee limitation at issue in this case arises from Congressional efforts in 1991 to streamline state procedures for collecting such fees by establishing a single state registration system ("SSRS"). H.R. Conf. Rep. No. 404, 102 Cong., First Sess. 437 (1991) reprinted in 1991 U.S.C. C.A.N. at 1818 (Pet. App. 97a-98a), resulting in legislation codified at 49 U.S.C. §11506 [1]. (Pet. App. 99a-101a).

One portion of the Congressional enactment was a determination that the level of fees charged by the various states in effect as of November 15, 1991 should be frozen in place for future periods to correlate with other uniformity provisions of the SSRS legislation. Congress stated that charging fees in excess of that amount would constitute a burden on interstate commerce, as prohibited under the Commerce Clause. 49 U.S.C. §11506(c)(2)(C). (Pet. App. 100a) It specifically directed the Interstate Commerce Commission ("ICC") to issue standards to ensure that participating states conformed to this requirement. 49 U.S.C. §11506(c)(1). (Pet. App. 100a).

Petitioner Yellow maintains that the fee system announced by Michigan for complying with the SSRS produces fees

[1] The statute in question originally was enacted in 1991 as 49 U.S.C. §11506 but has since been recodified as 49 USC §14504. The responsibilities originally assigned to the Interstate Commerce Commission("ICC") under the statute have since been reassigned to the Secretary of Transportation and the Federal Motor Carrier Safety Administration, but the language otherwise remains unchanged. This petition will use the initial codified citation, 49 U.S.C. §11506, in referring to this statutory language.

which exceed the November 15, 199' levels. Yellow has been paying these fees under protest since 1993. It filed a timely and continuing action for refund in the Michigan Court of Claims which now involves potential recoveries in excess of $425,000. Nationwide, the issue posed by this decision involves approximately $150 million per year in annual fee increases which states will be allowed to charge to motor carriers if they follow the judgment of the Michigan Supreme Court. (Pet. App. 53a).

The particular fees at issue are the per-vehicle fees that Michigan charges for interstate vehicles commercially plated in Illinois. Yellow's position throughout this matter has been that the fee levels which Michigan was charging for such vehicles on November 15, 1991 must continue to be applied for such vehicles under the SSRS statute. Under a reciprocity arrangement in effect between Michigan and Illinois on November 15, 1991, Michigan had reduced its interstate registration fees for Illinois-plated vehicles from $10 per vehicle to zero. In implementing SSRS, however, Michigan took the position that it was permitted to increase fees for Illinois-plated vehicles to the $10 per vehicle SSRS maximum.

The Michigan Court of Claims and the Michigan Court of Appeals agreed with Yellow's position and ordered Michigan to refund all fees collected for Yellow's Illinois-plated vehicles. *Yellow Freight System, Inc. v. State of Michigan, et al.*, No. 95-015706-CM (March 13, 1996, not reported) ("*Yellow I*") (Pet. App. 39a-42a); *Yellow Freight System, Inc. v. State of Michigan, et al.*, 231 Mich. App. 194, 585 NW2d 762 (1998) ("*Yellow II*") (Pet. App. 23a-38a). A divided Michigan Supreme Court, however, reversed these decisions based on its statement that a fee based on reciprocity agreements could not be treated as a "fee" within the meaning of the SSRS statute for the purpose of fixing future fee levels. *Yellow Freight System, Inc. v. State of*

Michigan, et al., 464 Mich. 21, 627 NW2d 236 (2001) ("*Yellow III*") (Pet. App. 2a-22a) Because the Michigan Supreme Court opinion ignores a specific statutory interpretation to the contrary in the ICC's implementing rulemaking proceeding, is in direct conflict with a decision of the D.C. Circuit affirming the ICC's findings, and inserts a condition into the statute not imposed by Congress, Yellow asks this court to grant certiorari and reverse the Michigan Supreme Court opinion.

A. Underlying Statute

Beginning in 1965, Congress enacted legislation permitting states to require registration of for-hire motor carriers intending to operate in interstate commerce within their borders[2]. Under this legislation, the ICC was directed to maintain standards under which such registration would not constitute an undue burden on interstate commerce in violation of the Commerce Clause. The resulting arrangement required interstate carriers to pay interstate fees in varying amounts to most states in which they conducted interstate operations[3]. For administrative convenience, state regulatory commissions through their national umbrella organization began issuing so-called "bingo cards" on which the carriers could place so-called "bingo stamps" from each of the pertinent states to be carried in their vehicle cabs as proof of payment of these fees.

In 1991, Congress decided to streamline this fee system by converting it to a "single pay" system similar to other multi-state tax and licensing systems applicable to the trucking

[2] Pub. L. No. 89-170, §2, 79 Stat. 648, added September 6, 1965, initially codified as 49 U.S.C. § 202(b)(2), recodified as 49 U.S.C. § 11506 by Pub. L. 95-473, 92 Stat. 1448, added October 17, 1978 (repealed 1991).

[3] Charging of such fees was and remains permissive with each state. Pet. App. 55a-56a.

industry. The overall concept involved channeling all Registration fee payments through a designated base state[4], which then would distribute fees to the other states through a uniform accounting system. In lieu of collecting bingo stamps from multiple states, the motor carriers would receive receipts from their base state which would constitute evidence of registration in other states. State participation in the SSRS was voluntary, but any state wishing to charge fees for registration of interstate vehicles was required to conform to SSRS standards.

The express purpose of Congress was that these changes would be revenue neutral. Under the SSRS statute, Congress stated that the actual fee levels charged by the various states were to remain unchanged and that fee levels were to be frozen in place at the levels being charged as of November 15, 1991. The specific Congressional language concerning fee uniformity stated that SSRS states were required to establish a fee system for registration that

> will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. 49 U.S.C. § 11506(c)(2)(B)(iv)(III) (Pet. App. 101a).

The legislative history similarly stated that

> States will not be allowed to charge a greater fee * * * than the fee they charged under the former program as of November 15, 1991. (Pet. App. 98a).

As the ICC described it, the intent of Congress was

> that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced. (Pet. App. 53a-54a).

[4] As implemented by the ICC regulations, the base state is either the state of the carrier's principal place of business or, for carriers domiciled in a non-participating state, the participating state in which the carrier will operate the largest number of vehicles. Pet. App. 86a.

The entire legislative history of the creation of the SSRS is described in H.R. Conf. Rep. No. 404, 102nd Cong., 1st Sess. 1991 437-438 (1991), *reprinted* in 1991 U.S.C. C.A.N. 1679, 1889, 1991 WL 257494. (Pet. App. 97a-98a).

The details of creating and implementing the single state registration system were not prescribed in the Congressional enactment itself. Congress, rather, specifically delegated that task to the ICC. In 49 U.S.C. §11506(c)(1), Congress stated that the ICC "*shall* prescribe * * * standards" to "implement a system under which (A) a motor carrier is required to register annually with only one State [and] (B) the State of registration shall fully comply with standards prescribed under this section". (Pet. App. 99a) (emphasis added). The ICC was given 18 months to put such standards into effect. *Id.* 49 U.S.C. §11506(a) described those standards as the specification of "procedures required by regulations of the [ICC] to prove the lawfulness of transportation." *Id.* 49 U.S.C. § 11506 (c)(2)(B) stated that such standards "*shall* establish a fee system" that results in the fee levels previously described at 49 U.S.C. §11506(c)(2)(B)(iv)(III). (Pet. App. 100a) (emphasis added).

The legislative history similarly indicates a specific and explicit intention of Congress that the details of implementing and applying the SSRS statute were being delegated to the ICC. The Conference Report stated that the SSRS was "to be instituted by the [ICC], in consultation with the participating states and the trucking industry, in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible." H.R. Conf. Rep. No. 404, *supra*, at 438. (Pet. App. 98a).

B. ICC Implementation

As ordered by Congress, the ICC initiated a rulemaking proceeding to establish regulations and standards for implementing the SSRS system. An initial decision and

advance notice of proposed rulemaking were issued in May, 1992 seeking public participation and comments.[5] Following comments, the ICC issued a second decision in January, 1993 proposing regulations and inviting further comment.[6] A final comprehensive decision was issued in May, 1993 in *Single State Insurance Registration*, 9 ICC 2d 610 (1993) ("*Single State*") (Pet. App. 43a-96a) In this final proceeding, the ICC issued regulations [7] stating how the SSRS was to be applied by states electing to participate and provided further findings as to how these regulations should be interpreted. Both Petitioner Yellow and the Michigan Public Service Commission filed comments at both stages of this proceeding. *Single State Insurance Registration* (*not printed*), *supra at* 1993 WL17833*19; *Single State, supra* at Pet. App. 83a.

One issue raised by commenting parties, and the Commission was the method to be used in determining the per vehicle registration fee which each participating state had collected or charged as of November 15, 1991 within the meaning of the SSRS statute. A particular issue concerned so-called reciprocity agreements between states. Under such agreements, state transportation authorities are legislatively or administratively permitted under state laws to charge less than their base statutory per vehicle registration fees to carriers or vehicles based in other states which afford the same privileges in return. As noted in *Single State*, state interests generally took the position that they should be allowed to ignore the fee levels they actually had been charging under reciprocity agreements as of November 15, 1991, in determining the amount that could be charged under

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[5] *Single State Insurance Registration*, 57 Fed. Reg. 20072 (1992).

[6] *Single State Insurance Registration* (*not printed*),1993 WL17833 (January 22, 1993).

[7] 49 C.F.R. 1023 (Pet. App. 85a-96a), since redesignated as 49 C.F.R. 367.

SSRS. (Pet. App 52a), While initially agreeing with this position from the standpoint of administrative convenience, the ICC eventually concluded that such a method did not comply with either the letter or the spirit of the SSRS statute. (Pet. App. 53a-54a)

The ICC noted that a number of the trucking industry commentors argued that the underlying statute froze fees at the level collected or charged as of November 15, 1991 and that the ICC could not sanction fees higher than those charged or collected. *Id.* It found that if states were to discontinue or disregard their reciprocity agreements, per vehicle fees for many carriers could increase greatly over their November 15, 1991 levels. (Pet. App. 53a) According to the ICC, to have ruled otherwise would have meant that state registration fees could have increased by approximately $150 million per year over their November 15, 1991 levels, a result clearly not intended by Congress. (Pet. App. 53a-54a). The ICC accordingly concluded that states must use fees charged or collected under reciprocity agreements on November 15, 1991 to determine the future fee levels required to be charged under the SSRS statute and the ICC's regulations. (Pet. App. 54a).

State interests challenged this finding in an appeal to the United States Court of Appeals, District of Columbia Circuit. In *National Association of Regulatory Utility Commissioners v. ICC*, 41 F3d 721, 309 U.S. App. D.C. 325 (D.C. Cir. 1994), a D.C. Circuit panel unanimously rejected this challenge. The court found that the ICC ruled correctly that "the plain language of the statute preclude[d] petitioners' interpretation" that lower fees based on reciprocity agreements should not be given effect in determining the November 15, 1991 fee levels required to be continued under the SSRS statute. *Id.* at 729. The panel stated that the statute was clear and unambiguous and that it made no difference whether

Congress actually focused on the reciprocal discount issue or was even aware of it. *Id.*[8]

C. Michigan Litigation

The instant litigation arose because Michigan decided to ignore fees being charged to carriers for operations on November 15, 1991 based on reciprocity arrangements in determining future fees under SSRS. Petitioner Yellow, like many other carriers, had base plated large portions of its interstate operating fleet in Illinois for many years. In 1991 and a number of prior years, Michigan had a reciprocity arrangement in place with Illinois under which vehicles commercially plated in Illinois were not charged registration fees by Michigan and vice-versa. (Pet. App. 5a, 25a-26a) For calendar year 1991, for example, Michigan did not charge vehicle registration fees to any interstate motor carrier for vehicles which were commercially plated in Illinois. (Pet. App. 5a, 25a-26a). It is undisputed that the fee which Michigan was charging as of November 15, 1991 for registering Illinois-plated vehicles to conduct interstate operations in Michigan on that date was zero. (Pet. App. 5a, 25a-26a). Effective February 1, 1992, however, Michigan changed its policy and began assessing a $10 per vehicle fee for Illinois plated vehicles operated by carriers such as

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[8] Following *Single State*, the ICC itself also issued a decision reemphasizing the statutory requirement that reciprocity-based registration fees be continued in effect. In *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Regulation*, 9 ICC 2d 1184 (1993), the ICC answered petitions from a number of states seeking permission to increase fees above the levels established by their November 15, 1991, reciprocity agreements. The ICC rejected these requests, stating that "the language of the statute is clear" and that "Congress mandated a fee freeze; it did not qualify its mandate". *Id.* at 1194. *American Trucking* also held that the statutory freezing of fee levels would not be affected by the fact that a state had announced a prospective fee increase for the following year prior to November 15, 1991. *Id.* at 1195.

Yellow which maintained their principal places of business in states other than Illinois.[9] (Pet. App. 5a).

As result of SSRS and the ICC's implementation actions, Yellow in late 1993 made preparations to submit its initial registration fee payments for the first year of the effectiveness of the SSRS, 1994. It made a specific inquiry with the appropriate state agency, the Michigan Public Service Commission ("MPSC"), to confirm that its vehicles commercially plated in Illinois could be registered for Michigan operations without a fee payment, in the same manner as had been the case for vehicles operating on November 15, 1991. Yellow was told, however, that Michigan insisted on the full $10 per vehicle fee that would have been charged in1992 for Illinois based vehicles operated by carriers headquartered in states other than Illinois. Michigan's position was that it could consider its 1992 fees to that effect as the fees "collected or charged as of November 15, 1991" because it had announced those fees prior to November 15 and had begun collecting those fees from carriers wishing to make advance payments.[10] Yellow accordingly submitted such payments under protest.[11]

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[9] The mechanism of the change implemented by Michigan was that Michigan began affording vehicle fee reciprocity based on the motor carrier's principal place of business rather than on the state in which the motor carrier was commercially plating its vehicles. This change required carriers such as Yellow which plated their vehicles in Illinois but were not headquartered there to pay $10 per vehicle fees for operations in 1992 unless the states of their principal place of business had reciprocity arrangements with Michigan.

[10] This position had been specifically considered and rejected by the ICC in *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Regulation, supra* at 9 ICC 2d 1195, and was not adopted by the Michigan Supreme Court as its basis for sustaining the MPSC's imposition of the $10 per vehicle registration fees.

[11] Under the SSRS structure, Yellow submitted the payments for Michigan to Yellow's base state, Kansas, stating that such payments were

In 1994, following several letters and informal contacts with the MPSC, Yellow filed timely claims with the Michigan Court of Claims seeking refunds of its SSRS payments for the pertinent calendar years. There was no response to these claims and formal litigation commenced in March, 1995. By stipulation Yellow has continued to make annual payments at the $10 level during the pendency of this litigation but such payments will be refunded with interest if Yellow's position in this matter prevails. The current value of the amounts at issue is approximately $425,000, with additional fees accruing in future years.

In proceedings before the Michigan Court of Claims, the parties filed cross-motions for summary disposition. On March 13, 1996, the Court of Claims issued an opinion granting Yellow's motion in part[12] and denying the State's motion. (Pet. App. 42a) As pertinent to this proceeding, the Court of Claims ordered a full refund of all of the registration fees which Yellow had paid to Michigan under protest. *Id.* The parties then filed cross-appeals in the Michigan Court of Appeals. Following briefing and argument, the Court of Appeals issued an opinion affirming the decision of the Court of Claims. (Pet. App. 35a). The State appealed this decision to the Michigan Supreme Court. On May 15, 2001, again after briefing and argument, the Michigan Supreme Court with two dissents issued an opinion holding that Yellow was not entitled to refunds of the challenged SSRS fees. (Pet. App. 11a, 15a, 22a).

The majority opinion of the Michigan Supreme Court was concerned solely with the issue of whether fee levels charged

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under protest. Kansas directed Yellow to seek refunds from Michigan rather than from Kansas.

[12] Yellow's complaint also sought an award of attorney fees under 42 USC § 1988. The Court of Claims and the Court of Appeals did not grant this relief and Yellow did not seek further review on this issue.

by states on November 15, 1991 should be ignored for SSRS purposes if those fee levels were the result of so-called reciprocity arrangements. (Pet. App. 6a). As noted previously, the ICC had considered this issue in the course of its rulemaking proceeding in *Single State* and concluded that there was no basis for excluding fee levels based on reciprocity agreements from the general statutory requirement that fee levels "collected or charged" as of November 15, 1991 be continued. (Pet. App. 53a-54a).

Without any citation to the statutory language, the court majority stated that the fee referred to by the SSRS statute could consist only of what the court described as the "generic fee" of $10.00 per vehicle described in the first sentence of the Michigan registration fee statute, Mich. Comp. Laws § 478.7(4) (2001). (Pet. App. 9a). The court stated that using fees produced by reciprocity agreements authorized by the second sentence of the registration fee statute was a concept "not within the express language of the [SSRS] statute", again, however, without any reference to language in the SSRS statute itself. (Pet. App. 10a-11a). The court further found that the SSRS statute as written was clear and not ambiguous so as to eliminate any requirement of deference to the statutory construction rendered by the ICC in *Single State*. (Pet. App. 9a). Nowhere in the majority opinion did the Michigan Supreme Court cite any language from the SSRS statute or its legislative history which suggested that registration fees collected or charged under reciprocity agreements were to be treated differently than other collected or charged fees in determining the fee level required under SSRS.

The two dissenting justices strongly disagreed with the majority's conclusion that reciprocity agreements are not relevant in determining the fee level required to be charged under the SSRS statute. Justice Kelly reviewed the Michigan fee statute, Mich. Comp. Laws. § 478.7(4) (2001) and concluded that "reciprocity agreements are an inherent part of the state's registration fee system". (Pet. App. 13a). She stated that only a strained reading of the phrase "collected or charged" in the SSRS statute could lead to the conclusion that Michigan was charging the so-called "generic" $10 fee when it in fact was not doing so. (Pet. App. 14a) Justice Cavanaugh stated that the numerous grammatical possibilities for interpretation of the phrase "collected or charged" demonstrated that the SSRS statute was, at very least, ambiguous and offered room for disagreement. (Pet. App. 19a-20a). Both justices stated that the court should defer to the ICC's interpretation of the SSRS statute, citing this court's opinion in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837; 104 S.Ct. 2778; 81 L.Ed.2d 694 (1984)

REASONS FOR GRANTING THE PETITION

The Petition for Certiorari should be granted to rectify the open and express conflict between the Michigan Supreme Court and the D.C. Circuit in interpreting the impact of reciprocity agreements under the SSRS statute. A clear conflict exists between a state court of last resort and a United States Court of Appeals within the meaning of Sup. Ct. R. 10(b). The opinion of the Michigan Supreme Court majority states specifically that it does not agree with the decision of the D.C. Circuit in *National Association of Regulatory Utility Commissioners v ICC*, *supra* at 41 F3d 721. (Pet. App. 7a). The disagreement between the two courts is clear on its face. The D.C. Circuit stated that "the plain language of the [SSRS] statute precludes" allowing states to charge fees higher than those in place on November 15, 1991 under reciprocity agreements. *Id.* at 729 The Michigan Supreme Court opinion by contrast states that fees based on reciprocity agreements "are not relevant in determining what fee was 'charged or collected' as of November 15, 1991." (Pet. App. 11a).

Action by this court is required to resolve this judicial conflict involving the application of a statute enacted by Congress in its core area of legislative responsibility to regulate interstate commerce.

The statutory interpretation advanced by the Michigan Supreme Court is plainly wrong. With no justification whatsoever, the Michigan Supreme Court has added its own unsupported qualification to simple statutory language from Congress requiring that state registration fees for interstate vehicles be maintained at the same level as existed on November 15, 1991. While the statute bases its continuing fee requirement strictly on "the fee * * * collected or charged as of November 15, 1991", the Michigan Supreme Court states inexplicably that this language (a) does not include fee levels collected or charged based on reciprocity agreements in effect on that date and (b) includes theoretical fee amounts which were *not* being collected or charged on that date as a result of being overridden by reciprocity agreements. As noted by the ICC in interpreting this statute, "Congress mandated a fee freeze; it did not qualify its mandate". *American Trucking Association—Petition for Declaratory Order—Single State Insurance Regulation, supra,* 9 ICC 2d at 1194. The effort of the Michigan Supreme Court to create a judicial exception to the unambiguous requirement of the SSRS statute falls clearly outside the settled jurisprudence of this court regarding statutory interpretation.

Even if there were room for argument concerning the proper interpretation of the statute, the Michigan Supreme Court was required to defer to the ICC's interpretation. Congress specifically and statutorily ordered the ICC to set standards and procedures for applying the SSRS legislation. 49 U.S.C. § 11506(c)(1); 49 U.S.C. § 11506(a). It was silent concerning the impact of reciprocity agreements on the statute. No clearer case could exist for the application of the settled precedents of this court requiring deference to the

statutory and regulatory interpretations of an agency charged with administration of a federal statute. *United States v. Mead Corporation*, __U.S.__ 121 S.Ct. 2164 at 2172,__ L.Ed.2d__ (2001); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc., supra*, 467 US 837. The ICC's interpretation at minimum is clearly reasonable to the degree necessary to require deference to its interpretation in the area of its particular expertise.

These issues involve interpretation of a significant federal regulatory reform statute, impacting the nation's trucking industry and 38 states. Estimates before the ICC indicated that states had the potential of increasing charges to the motor carrier industry by as much as $150 million per year if they were allowed to increase registration fees above the level charged under reciprocity agreements. The Michigan Supreme Court opinion is an open invitation to states seeking additional revenues from interstate carriers to raise fees by disregarding reciprocity agreements, in derogation of the clear intent of Congress to make its 1991 enactment of regulatory simplification revenue neutral. This Court should grant certiorari to resolve the uncertainty in interstate motor carrier transportation created by the Michigan Supreme Court opinion.

I. THE SSRS STATUTE REQUIRES THAT STATE REGISTRATION FEE LEVELS MUST NOT EXCEED FEE LEVELS IN EFFECT ON NOVEMBER 15, 1991, IRRESPECTIVE OF WHETHER SUCH FEE *LEVELS* WERE THE RESULT OF RECIPROCITY AGREEMENTS.

Basic principles of statutory construction require rejection of the interpretation of the SSRS statute advanced by the Michigan Supreme Court. The plain and simple language of the statute negates both the interpretation and the result created by the court's opinion. This interpretation is contrary

to ordinary principles of statutory construction, contrary to legislative history, inconsistent with the underlying factual circumstances, and totally unexplained by the Michigan Supreme Court opinion. The unambiguous construction of the statute is the one advanced by the ICC in *Single State* and *American Trucking,* by the D.C. Circuit in *National Association of Regulatory Utility Commissioners*, and by the Michigan Court of Appeals below (Pet. App. 29a). That interpretation, rather than the arbitrary and conclusory interpretation of the Michigan Supreme Court, should be continued as the governing law regarding this statute.

The statute itself provides simply that the ICC is required to establish standards under which a state participating in the SSRS may only require payment of a registration fee

> that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. 49 U.S.C. § 11506(c)(2)(B)(iv)(III) (Pet. App. 101a).

The ICC, in turn, issued a regulation under its decision in *Single State* which required carriers registering with a state under the SSRS to submit a per vehicle fee

> which fee must equal the fee, not to exceed $10, that such State collected or charged as of November 15, 1991. Former 49 C.F.R. 1023.4(c)(4)(ii) (Pet. App. 89a).

Nothing in the text of either the statute or the regulation suggests that any differentiation is to be made between fees which are fixed by statute enactments and fees which result from reductions authorized by statute based on state agency reciprocity agreements. The requirement simply is that any fee for the future must be equal to "the fee" which the state collected or charged as of November 15, 1991.

Settled rules of statutory construction require the interpretation of the statute reached by the ICC, the D.C. Circuit, and the Michigan Court of Appeals. The statute

imposes a general rule that future state fees for vehicle registration must be equal to the fee which was being "collected or charged" by the state for such registration on November 15, 1991. There is no statutory exception created to this general rule. Exceptions to statutes of general applicability are not to be implied. 2A N. Singer, *Sutherland Statutory Construction* § 47:11 at 249 (6th Ed., 2000). If a legislative purpose is expressed in plain and unambiguous language, the duty of the courts is to give it effect according to its terms. *U.S. v. Rutherford*, 442 U.S. 544, 551, 99 S.Ct. 2470; 61 L.Ed. 2d 68 (1979) If a general rule is presented in a statute and no exception is provided, courts are not empowered to make one. *Burnsed v. State Board of Control*, 189 Cal. App. 3d 213, 217; 234 Cal. Rptr. 316 (1987) The law imposes a strong presumption against implied exceptions to statutes of general applicability. *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 805; 711 N.E.2d 589 (1999)

This lack of statutory ambiguity is supported by the legislative history. Like the statute itself, the legislative history is devoid of any distinction between various methods by which registration fees may have been put into place as of November 15, 1991. The legislative history states merely that

> States will not be allowed to charge a greater fee * * * than the fee they charged under the former program as of November 15, 1991. (Pet. App. 98a)

There is no indication of any intent on the part of Congress that states should be permitted to increase their fees by canceling reciprocity agreements even though they could not increase their fees by altering their statutory fee structure. The legislative history thus supports the general conclusion that no statutory exceptions are present to limit the types of fees which must be continued in effect under the SSRS legislation. Compare, *Sutherland Statutory Interpretation, supra*, at Section 46:04, p. 151.

The construction of the statutory language and legislative history adopted by the ICC, the D.C. Circuit, and the Michigan Court of Appeals is consistent with the underlying factual circumstances surrounding registration fees and reciprocity agreements. The regulatory proceedings before the ICC in *Single State* provide a clear indication of these facts. As described in *Single State*, a number of states had long-standing fee levels established for various categories of carriers based on reciprocal arrangements with a variety of other states. For example, in an example raised by Petitioner Yellow, the state of Nebraska on November 15, 1991 was charging $10 per vehicle to carriers from nine states and was charging $1 per vehicle or less to carriers from 24 states. (Pet. App. 53a). Fees charged by Nebraska would have been at least ten times greater for carriers based in the latter category of states if Nebraska had been allowed to increase its reciprocity based fees to the $10 level. Another commenting party projected a cost increase of $55 per truck over its entire fleet if reduced fees based on reciprocity were eliminated. *Id.* Still another party indicated that allowing states to increase their fees from the reciprocity-based levels to state maximum levels could result in a 400 percent increase in total state fees, from $50 million to $200 million annually. *Id.* Such statements support the concern that ignoring reciprocity-based fees would threaten the desire of Congress for revenue neutrality in the SSRS legislation.

These facts support the statutory interpretation reached by the ICC itself in *Single State* and *American Trucking*, by the D.C. Circuit in affirming *Single State*, and by the Michigan Court of Appeals in rejecting the argument ultimately accepted by the Michigan Supreme Court. All of these statutory interpretations are clear. The ICC's statutory interpretation in *Single State* was as follows:

> We have concluded that our prior proposal regarding this issue did not carry out the letter of the law that fees be frozen as of November 15, 1991, or the intent of the law that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced. As the motor carrier interests point out, were States to discontinue their reciprocity agreements, per vehicle fees for many carriers could increase greatly, and some states would realize windfalls. * * * In brief, we have concluded that participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991 as required by §11506(c)(2)(B)(iv). (Pet. App. 53a-54a).

The D.C. Circuit in affirming the ICC in *Single State* held as follows:

> [W]e think the Commission was correct in concluding that the plain language of the statute precludes Petitioners' interpretation. It does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it. Nor is it of any significance that the Commission initially misread the statute; that is what comment periods are for. *National Association of Regulatory Utility Commissioners v ICC*, *supra*, at 41 F3d 733.

The ICC in *American Trucking* held as follows:

> The language of the statute is clear. * * * Congress mandated a fee freeze; it did not qualify its mandate. *American Trucking Associations-Petition for Declaratory Order—Single State Insurance Regulation*, *supra* at 9 ICC 2d 1194.

Finally, the Michigan Court of Appeals in *Yellow II* stated:

> The state also suggests that states should not be required to consider reciprocity agreements in determining the amount of fees "charged or collected as of November 15, 1991." In *Single State Ins. Registration*, 9 ICC 2d 610

(1993), the ICC determined that states must consider the reciprocity agreements. The ICC's decision in this regard was upheld in *National Association of Regulatory Commissioners v ICC*, 309 U.S. App DC 325; 41 F3d 721 (1994). Although that decision is not binding on this court, we find it persuasive and adopt its ruling with regard to this issue. (Pet. App. 29a).

Against this backdrop, the opinion of the Michigan Supreme Court advances virtually nothing in justification of its conclusion that reduced fees based on reciprocity agreements may be ignored in determining future fee levels under SSRS. The court's actual discussion seeking to interpret the SSRS statute embraces less than two pages in the officially reported versions of the opinion. The opinion recognizes that the Michigan registration fee statute contains two sentences, one imposing a fee of $10.00 per vehicle and the second allowing the Michigan Public Service Commission to reduce or waive fees by entering into reciprocity agreements. (Pet. App. 10a). The full text of the Michigan statute reads as follows:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection. Mich. Comp. Laws. § 478.7(4) (2001) (Pet. App. 102a).

After characterizing the fees under the first sentence as the "generic" fees and fees under the second sentence as "voluntary agreements" the court stated without explanation or citation that

> * * * The clear focus of [the SSRS statute] is on the generic [fee] * * (Pet. App. 10a).

It then stated, again without explanation, that consideration of fees charged or collected by states under reciprocity agreement "added a concept not within the express language of the statute". (Pet. App. 10a-11a). While the court recognized that waiver of the $10 fee under the second sentence of the Michigan statute would result in that fee not being "charged or collected" within the meaning of the SSRS statute (Pet. App. 10a), its opinion suggests that this reduction of fees would not be entitled to consideration because it would affect only "a particular carrier". *Id.* The court stated that it was not for the court or the ICC "to insert words into the statute". (Pet. App. 11a).

Even the most strained attempt to read these two pages to support the Michigan Supreme Court decision fails to breathe logic into the court's ultimate conclusion. The court cites no support for its suggestion that the reciprocity arrangement between Michigan and Illinois in effect on November 15, 1991 benefits only a "particular carrier". (Pet. App. 10a). The reciprocity arrangement applies to any vehicle of any carrier commercially plated in either state. The position adopted by the lower Michigan courts in *Yellow I* and *Yellow II* similarly would hold that registration fees for the future are not chargeable to any vehicle commercially registered in Illinois by any carrier. The court opinion does not point to any argument raised below which would condition the right to a reduced fee on whether or not the carrier in question had been paying for its vehicles at the reduced fee level in 1991.

There similarly is no merit to the suggestion in the opinion that the interpretation of the SSRS statute advanced by Petitioner would be sustainable only if specific language had been added to the statute to reference reciprocity agreements. By the court's own admission, a fee waived by a state under reciprocity agreements is a fee not being "collected or charged". (Pet. App. 10a). No specific language is required to be added to the SSRS statute to make clear that the general

rule requiring continuation of the level of fees collected or charged in 1991 extends to the level of fees "collected or charged" under reciprocity agreements. As noted previously, specific language is required to create an exception, not to demonstrate the absence of one. Compare, 2A *Sutherland Statutory Construction, supra* at § 47:11.

Indeed, as noted in the dissenting opinion of Justice Kelly, the Michigan registration fee statute specifically recognizes that reciprocity agreements "are an inherent part of the state's registration fee system". (Pet. App. 13a) It is highly illogical to conclude that fee reductions based on reciprocity agreements must be excluded from consideration under the SSRS statute when the authority to reduce fees based on such agreement is embedded in the same statutory subsection that contains the base fee itself. Nothing in the Michigan Supreme Court's opinion justifies its arbitrary conclusion that reduced fee levels created by reciprocity agreements are not required to be continued in effect by the SSRS legislation.

II. THE MICHIGAN SUPREME COURT WAS REQUIRED TO DEFER TO THE ICC'S INTERPRETATION OF THE SSRS STATUTE AS IT APPLIES TO RECIPROCITY AGREEMENTS WHERE CONGRESS SPECIFICALLY DELEGATED IMPLEMENTATION OF THE STATUTE TO THE ICC AND WAS SILENT CONCERNING THE IMPACT OF RECIPROCITY AGREEMENTS.

The Michigan Supreme Court opinion at best suggests a possible ambiguity or uncertainty in the language of the SSRS statute as to whether fee levels established by reciprocity agreements are entitled to be given the same consideration as fee levels established by other statutory methods. The considerations mentioned by the Michigan Supreme Court opinion may indicate an underlying policy

argument that requires treating fee levels established by statutorily authorized reciprocity agreements differently than fee levels of fixed statutory amounts. To the extent that such issues create a statutory ambiguity, however, the settled law of this court requires that deference be granted to the resolution of that ambiguity advanced by the ICC in *Single State*.

Congress both specifically and implicitly intended that any gaps or implementing details in the SSRS statute were to be resolved by the ICC. Congress ordered the ICC *by statute* to issue the interpretative standards concerning reciprocity agreements in *Single State* that Michigan seeks to avoid. In 49 U.S.C. § 11506(c)(1), Congress stated that the ICC "*shall* prescribe * * * standards" to "implement a system under which (A) a motor carrier is required to register annually with only one State [and] (B) the State of registration shall fully comply with standards prescribed under this section". (Pet. App. 99a). (emphasis added). 49 U.S.C. § 11506(a) described those standards as the specification of "procedures required by regulations of the [ICC] to prove the lawfulness of transportation." *Id.* 49 U.S.C. § 11506 (c)(2)(B) stated that such standards "*shall* establish a fee system" that results in the fee levels that are the subject of this case. (Pet. App. 100a). (emphasis added). The ICC's actions in issuing the *Single State* decision applying the SSRS statute thus did not constitute agency action which was merely permissive or inferrable from the actions of Congress. The ICC rather was compelled to issue these decisions to comply with the statutory direction from Congress that appropriate and uniform standards "shall" be issued to govern this complex area of interstate commerce.

In these circumstances, the Michigan Supreme Court recognized as have other state courts that it was required to afford the same deference to the determination of a federal administrative agency charged with implementation of a

federal statute as would be required of any federal court. *Yellow III*, (Pet. App. 8a), citing *Totemoff v. State*, 905 P.2d 954, 967 (Alaska, 1995), *Delorme v. North Dakota Dep't of Human Services*, 492 N.W.2d 585, 587, n. 2 (N.D., 1992), *Rodriguez v. Perales*, 86 N.Y.2d 361, 367, 657 N.E.2d 247, 633 N.Y.S.2d 252 (1995), and *Bell Atlantic Mobile, Inc. v. Dep't of Public Utility Control*, 253 Conn. 453, 470, 754 A.2d 128 (2000). The leading case in this area cited by the court was *Chevron USA, Inc. v. Natural Resources Defense Council, Inc., supra*, 467 US 837. Subsequent to issuance of the Michigan Supreme Court opinion, this court has issued its decision in *United States v. Mead Corporation*, *supra* at 121 S.Ct. 2164. While *Mead* provides substantial explanation of the criteria expressed in *Chevron*, the principles of both of these cases remain applicable to the instant proceeding.

Under both *Chevron* and *Mead*, in the case of statutory ambiguity, courts are required to defer to the statutory interpretation advanced by a regulatory agency charged with enforcement of a statue either where Congress has expressly delegated authority to the agency to elucidate a specific provision of the statute by regulation or where it is clear that Congress would have expected the agency to address an ambiguity or fill a space in the enacted law. *Mead, supra*, at 121 S.Ct. 2171, 2172; *Chevron, supra*, 467 U.S. at 843-844, 845. If either of these situations arise, reviewing courts are obliged to accept the agency's position. *Mead, supra*, at 121 S.Ct. 2172; *Chevron, supra*, at 467 U.S. 842-845. The *Chevron-Mead* principle applies only where the agency either has expressed its statutory interpretation in the process of rulemaking or adjudication or where the agency is interpreting its own regulations. *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed. 2d 79 (1997).

The ICC's interpretation of the SSRS statute concerning the impact of reciprocity-based fees is entitled to deference under these principles of law. Initially, the *Mead-Chevron* requirements of either express or implied delegation to the agency are satisfied by the text of the SSRS statute. As noted above, the statute expressly ordered the ICC to issue amending regulations to cover issues involved in developing standards for applying the statute. 49 U.S.C. § 11506(c)(1); 49 U.S.C. § 11506(a). The structure of the statute, moreover, makes it clear that details of statutory application were to be prescribed and resolved by the ICC. The legislative history, for example, states specifically that

> This system is to be instituted by the Interstate Commerce Commission in consultation with the participating states and the trucking industry, in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible. (Pet. App. 98a).

The ICC's resolution of the reciprocity-based fee issue during the rulemaking proceeding directed by Congress thus constitutes a precise example of an agency resolution of an issue which Congress would have expected. Indeed, as noted by the D.C. Circuit in describing the ICC's actions

> it does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it. *National Association of Regulatory Utility Commissioners v. ICC*, *supra*, at 41 F3d 729.

The clear statutory intent of Congress in enacting the SSRS legislation was that the ICC was to be delegated with congressional authority to interpret the underlying statute to address an issue such as reciprocity-based fees.

The Michigan Supreme Court was under a particularly strong obligation to follow the ICC's interpretation because of the express delegation of authority implementing standards and procedures contained in the SSRS statute itself. Courts

owe a particularly high obligation to adhere to an agency interpretation where Congress has expressly delegated responsibility for implementing statutory details to that agency. Under *Chevron*, interpretations of legislation or regulations established under a specific statutory direction of Congress are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA v. Natural Resources Defense Council, supra*, 467 U.S. at 843-44. In these instances, "the highest level of deference to regulatory authorizations" is required when there has been an explicit delegation of congressional authority. *Ortiz v. Rental Management, Inc.*, 65 F.3d 335, 339 (CA 3 1995); *Hanson v. Espy*, 8 F.3d 469 (CA 7 1993); *Community Hospital v. Sullivan*, 986 F.2d 357 (CA 10 1993); and cases cited therein. The Court's reaffirmation of *Chevron* in *Mead* earlier this year specifically adopts this high standard of deference in situations of express statutory delegation of responsibility to an agency. *United States v. Mead Corporation, supra,* at 121 S.Ct. at 2171. This high standard, rather than the lesser standard of reasonableness, constitutes the test which the Michigan Supreme Court was required to apply in considering the ICC's statutory interpretation.

There is no question that the ICC's determination was expressed in a setting which was appropriate to give that determination sufficient binding effect. The decision of the ICC was issued as part of its opinion in a rulemaking proceeding properly noticed in the Federal Register in accordance with all requirements of the Administrative Procedure Act. The ICC decision served January 22, 1993 which produced the final decision in *Single State* gave specific notice to all parties that the issue of reciprocity agreements would be addressed in the final rulemaking decision. *Single State Insurance Registration, supra*, at 1993

WL 17833, *4. Full notice and an opportunity to comment on this issue accordingly were provided to all interested parties[13].

The ICC's final determination concerning reciprocity moreover constituted an explanation of the specific rules which it was issuing. One of those rules, 49 C.F.R. 1023.4(c)(4)(ii), contained the November 15, 1991 fee requirement. The ICC's explanation of that requirement constituted the agency's interpretation of its own regulation. Under the settled jurisprudence of this court, an agency's interpretation of its own properly promulgated regulations is entitled to deference. *Auer v. Robbins, supra* at 519 U.S. 461; *Christensen v. Harris County, supra* at 529 U.S. 587; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835; 104 L.Ed. 2d 351 (1989); *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945). The ICC's determination that reciprocity based fees are required to be continued in effect under SSRS is entitled to deference under *Mead* and *Chevron*.

There is no merit to the conclusion of the Michigan Supreme Court majority that the requirements of *Chevron* and *Mead* may be avoided because the majority's interpretation of the statute was dictated by the "plain meaning" of its terms, thus making the statute non-ambiguous. (Pet. App. 9a). The decisions of the ICC, the D.C. Circuit, the two lower Michigan courts, and the two dissenting justices clearly refute such an argument. In particular, the dissenting opinion of Justice Kelly points out that it is not unreasonable to conclude that fee levels established by the MPSC under reciprocity authorization granted by the second sentence of Michigan's fee statute are entitled to the same consideration as the so-

[13] Indeed, as a party in the *Single State* proceeding, the Michigan Public Service Commission arguably is bound by its results as affirmed by the D.C. Circuit under procedures for judicial review required under 28 U.S.C. § 2342.

called "generic" fee levels established by the first sentence of that statute. (Pet. App. 13a). As Justice Kelly noted in her dissent, it is the Michigan Supreme Court majority's construction of the statute that its strained, because that construction assumes that the state "collected or charged" a $10 per vehicle fee which it in fact did not collect or charge because of its reciprocity agreement. (Pet. App. 14a).

As Justices Kelly and Cavanaugh both point out, where reasonable minds can differ concerning interpretation of a statute, the statute is ambiguous. (Pet. App. 12a-13a, 17a). The D.C. Circuit in construing the same statutory provisions found that the "plain language of the statute precludes"allowing states to charge fees higher than those in place under reciprocity agreements on November 15, 1991. *National Association of Regulatory Utility Commissioners v. ICC, supra*, at 41 F3d 729.[14] Such findings clearly are those of "reasonably well-informed persons" which should be considered in determining whether the SSRS statute is, at very least, ambiguous. (Compare Pet. App. 17a). The Michigan Supreme Court's virtually unsupported statement that the plain meaning of the SSRS statute supports its position should not be accepted.

[14] While the Michigan Supreme Court majority opinion characterized this finding as one of deference (Pet. App. 7a), the D.C. Circuit finding clearly interprets the statute on its own merits rather than under any standard of deference to the ICC.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Court of Claims: 95-015706-CM
SC: 113656
COA: 194703

YELLOW FREIGHT SYSTEM, INC.,
Plaintiff-Appellee,

v.

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, STATE TREASURER, DEPARTMENT OF COMMERCE, DIRECTOR OF DEPARTMENT OF COMMERCE, MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN PUBLIC SERVICE COMMISSIONERS,
Defendants-Appellants.

113656
11 Oct 2000
Entered: May 15, 2001

ORDER

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED and the cause is REMANDED to the Court of Claims for further proceedings in conformity with the opinion filed herein.

APPENDIX B

MICHIGAN SUPREME COURT

Docket No. 113656.
Calendar No. 11.

YELLOW FREIGHT SYSTEM, INC,
Plaintiff-Appellee,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY and its STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE and its DIRECTOR, and MICHIGAN PUBLIC SERVICE COMMISSION and its COMMISSIONERS,
Defendants-Appellants.

Argued Oct. 11, 2000
Decided May 15, 2001

OPINION

WEAVER, C.J.

This case presents an issue of statutory interpretation. Plaintiff, Yellow Freight System, Inc., alleges that defendants collected registration fees in excess of the amount allowed under the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506, which restricts a state's registration fees to an amount "equal to the fee . . . that such state collected or charged as of November 15, 1991," 49 U.S.C. 11506(c)(2)(B)(iv)(III). Specifically, plaintiff contends that in determining the amount of the fee charged or collected on November 15, 1991, one must consider the effect that any then existing reciprocity agreements had on the fees.

We reject plaintiff's claims and hold that in determining the "fee . . . collected or charged" under 49 U.S.C. 11506(c)(2)(B)(iv)(III), Michigan's reciprocity agreements are irrelevant. We reverse the Court of Appeals decision affirming the Court of Claims order for summary disposition in favor of plaintiff and remand this case to the Court of Claims for further proceedings consistent with this opinion.

I

Congress has the power to "regulate Commerce . . . among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" that power to regulate commerce. U.S. CONST., art. I, § 8. Under the Commerce Clause, states can impose significant regulatory burdens on interstate motor carriers only when authorized to do so by Congress. *Michigan Pub. Utilities Comm. v. Duke*, 266 U.S. 570, 577, 45 S.Ct. 191, 69 L.Ed. 445 (1925). Over the years Congress has authorized the states to require registration of interstate motor carriers, subject to the supervision of the Interstate Commerce Commission. See Motor Carrier Act of 1935, P.L. 74-265, 49 U.S.C. 301 *et seq*. In 1991, Congress passed the ISTEA,[1] which directed the Interstate Commerce Commission (ICC) to restructure the then existing regulations governing vehicle registration and registration fees. 49 U.S.C. 11506. As a result, the ICC issued the "single state" registration system (SSRS) in 1993, 49 C.F.R. 1023.[2]

A brief overview of the previous interstate motor carrier registration system is helpful in understanding the dispute now before this Court. Before 1991, states could require interstate motor carriers to annually register and pay fees on each vehicle that operated within its borders. Thirty-nine

[1] Provisions similar to those in this section are now contained in 49 U.S.C. 14504.

[2] This was redesignated in 1996 as 49 C.F.R. 367.

states, including Michigan, elected to participate in a "bingo card" system.[3] Under the "bingo card" system interstate motor carriers attached a "bingo card" to each of their motor vehicles. States through which the vehicle traveled then issued each vehicle a registration "stamp" which was placed in a designated area on the bingo card. Participating states were allowed to charge no more than $10 per stamp.

While operating under the prior "bingo card" registration system, some states entered into reciprocity agreements, under which a state would discount or waive the registration fee for carriers based in the other's state. The motor carrier's principal place of business was most commonly used as the basis for determining reciprocity. Michigan, however, initially based its reciprocity agreements on the state in which the vehicle was "base-plated," i.e. where it was registered or license-plated.[4]

Seeking to "benefit the interstate carriers by eliminating unnecessary compliance burdens" and "to preserve revenues for the states which had participated in the bingo program," Congress replaced the old system by enacting the ISTEA.[5] The SSRS was intended to serve as the sole avenue for state registration of interstate carriers.[6] *Nat'l Ass'n of Regulatory*

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[3] The "bingo card" system served three main purposes: (1) to make it easier to determine whether a specific vehicle had been registered by simply looking at the "bingo card," (2) to ensure compliance by interstate motor carriers to register all vehicles in operation, and (3) to prevent carriers from operating uninsured vehicles.

[4] In other words, Michigan would waive its registration fee for vehicles base-plated in a state that waived its fee for vehicles that were base-plated in Michigan.

[5] H. R. Conf. Rep. No. 102-404, 102nd Cong., 1st Sess. 437 (1991), reprinted in 1991 U. S. Code Cong. & Admin. News, 1526, 1679, 1817.

[6] Participation in the SSRS was limited to the thirty-nine states that had elected to participate in the "bingo card" program. 49 U.S.C. 11506(c)(2)(D)

Utility Comm'rs v. Interstate Commerce Comm., 309 U.S. App. D.C. 325, 41 F.3d 721 (1994). Under the SSRS a motor carrier registers annually with only one state. This "registration state" is responsible for collecting the per-vehicle fees and distributing them to any participating states through which the carrier runs its motor vehicles. 49 U.S.C. 11506(c)(2)(A)(iii).

The section of the ISTEA at issue in the present case is subsection 11506(c)(2)(B)(iv). It provides that each state "shall establish a fee system" that "result[s] in a fee for each participating state that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . ."

In 1991, before the implementation of the SSRS, the Michigan Public Service Commission (MPSC) altered its reciprocity agreements. The MPSC adopted the more common "place of business" method of determining reciprocity, instead of the "base-plated" system that the MPSC had been using. This change was scheduled to become effective in February 1992. The MPSC mailed renewal applications reflecting this change to all interstate motor carriers, including the plaintiff, in September 1991. Plaintiff paid its 1992 fees[7] in September of 1991, under protest. Subsequently, plaintiff instituted this litigation.

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[7] At that time plaintiff's principal place of business was in Kansas, and it had 3,730 vehicles base-plated in Illinois and Indiana. Under Michigan's old reciprocity agreements, Michigan's fees for those 3,730 vehicles base-plated in Illinois and Indiana would have been waived. However, after Michigan changed its method for determining reciprocity to one based on a company's principal place of business, Plaintiff was required to pay a $10 vehicle registration fee for each of the 3,730 vehicles. Thus, rather than paying nothing under the old reciprocity method, plaintiff was required to pay $37,300 annually under Michigan's new system.

Plaintiff contended that Michigan could not alter its reciprocity agreements, arguing that under the federal statute those agreements were frozen at their November 15, 1991, levels. Ruling on cross motion, the Court of Claims agreed with plaintiff and granted its motion, in part, for summary disposition.[8] In a two-to-one decision, the Court of Appeals affirmed the Court of Claims ruling. 231 Mich.App. 194, 585 N.W.2d 762 (1998). This Court granted leave to appeal, 461 Mich. 1009, 611 N.W.2d 796 (2000).

III

There is no dispute that 49 U.S.C. 11506(c)(2)(B)(iv)(III) froze the registration fees that a state can charge as of November 15, 1991. The parties dispute the proper interpretation of a key phrase in that section of the ISTEA: "equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The fundamental question before us is whether Michigan's reciprocity agreements should be considered in determining what fees were charged or collected as of November 15, 1991. We conclude that under the plain language of the statute, reciprocity agreements are not relevant in making that determination.

A

This is an issue of first impression for this Court; nor have any other state courts addressed it. The only court that has considered it is the District of Columbia Circuit Court of Appeals, *Nat'l Ass'n of Regulatory Utility Comm'rs, supra*. That court followed the ICC's decision.[9] However, the ICC

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[8] Plaintiff's complaint also sought attorney fees under 42 U.S.C. 1988. The Court of Claims did not grant this relief, and plaintiff has not appealed that decision to this Court.

[9] The ICC has taken varying positions on this issue. In its Advance Notice of Proposed Rulemaking, 57 Fed. Reg. 20,072 (1992), and its Notice of Proposed Rulemaking, 58 Fed. Reg. 5951 (1993), the ICC found

subsequently reversed its position, and now says "we have concluded that participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov 15, 1991, as required by § 11506(c)(2)(B)(iv)." *Single State Ins. Registration* Exparte No. MC-100 (Sub-No. 6), 9 I.C.C.2d 610, 618-619 (1993). to ban states from charging registration fees in excess of preexisting reciprocal discounts, saying:

> [W]e think the Commission was correct in concluding that the plain language of the statute precludes petitioners' interpretation. It does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it. Nor is it of any significance that the Commission initially misread the statute; that is what comment periods are for. *Id*., at 729.

We are not bound to follow that decision,[10] and, for the reasons given below, we do not agree with the federal court's decision to defer to the ICC's interpretation of the ISTEA.

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that the reciprocity agreements were made voluntarily, and that there was no good reason for the ICC's involvement in them. The ICC had noted that "it might place a heavy administrative burden on a registration State were we to require that it collect from different carriers different fees from the same State depending on the various reciprocal agreements negotiated by the various states in which each carrier operates." 9 I.C.C.2d 610, 617 (1993).

[10] Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes. *See Bement v. Grand Rapids & Indiana R. Co.*, 194 Mich. 64, 160 N.W. 424 (1916), and *In re Hopps Estate*, 324 Mich. 256, 36 N.W.2d 908 (1949). However, where there is no United States Supreme Court decision upon the interpretation in question, the lower federal courts' decisions, while entitled to respectful consideration, are not binding upon this Court. *See Winget v. Grand Trunk W. R. Co.*, 210 Mich. 100, 117, 177 N.W. 273 (1920), *Schueler v. Weintrob*, 360 Mich. 621, 105 N.W.2d 42 (1960), and 21 CJS, Courts, §159, pp. 195-197.

B

Plaintiff contends that in interpreting the ISTEA we must give deference to the ICC's interpretation. Because the issue is the interpretation of a federal statute and the deference due a federal agency's construction of that statute, we will apply the rules of construction set out by the federal judiciary.[11] The seminal case is *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). There the United States Supreme Court established that a court must first determine whether the statute's meaning is clear; if so, then the court must apply the statute as written. If the statute is ambiguous, then the court must give deference to the agency's interpretation.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue,

[11] This Court has not previously determined what deference the courts of this state owe to a federal agency's interpretation of a federal statute. However, in that circumstance the Court of Appeals has applied the federal standards of deference as set out in *Chevron*, supra at 2778. *See Walker v. Johnson & Johnson Vision Products, Inc.*, 217 Mich. App. 705, 713, 552 N.W.2d 679 (1996), *Gibbs v. General Motors Corp.*, 134 Mich. App. 429, 432, 351 N.W.2d 315 (1984), and 231 Mich. App. at 200, 585 N.W.2d 762. This is also the approach taken by several other state courts. See for example: *Totemoff v. State*, 905 P.2d 954, 967 (Alaska, 1995), *Delorme v. North Dakota Dep't of Human Services*, 492 N.W.2d 585, 587, n. 2 (N.D., 1992), *Rodriguez v. Perales*, 86 N.Y.2d 361, 367, 657 N.E.2d 247, 633 N.Y.S.2d 252 (1995), and *Bell Atlantic Mobile, Inc. v. Dep't of Public Utility Control*, 253 Conn. 453, 470, 754 A.2d 128 (2000).

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-843, 104 S.Ct. 2778.

Here we find that the plain meaning of the terms of the ISTEA is clear, and we apply the statute as written. Because we find that the statute is not ambiguous[12], we need not proceed to the second step of *Chevron, supra*, and we do not reach the agency's interpretation.

C

The question before us is whether any then-existing reciprocity agreements should be considered when determining what fee the state charged or collected as of November 15, 1991. The ISTEA itself refers only to the fee collected or charged, and contains no reference to reciprocity agreements. 49 U.S.C. 11504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system" that "result[s] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the state had in place on November 15, 1991. We must look not at the fees paid by plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991.

[12] The dissent contends that the statute is ambiguous, asserting that this is demonstrated by "the several interpretations of its wording advanced by the parties." If the parties' conflicting interpretations were the measure of a statute's ambiguity, then almost every statute litigated would be deemed ambiguous. A statute is not ambiguous because it requires careful attention and analysis.

To determine what registration fee Michigan charged on November 15, 1991, we examine M.C.L. § 478.7(4); MSA 22.565(1)(4) in the Motor Carrier Act. Since 1989 that statute has provided for a fee of $10 to be charged for those motor carrier vehicles operating in Michigan and licensed in another state or province of Canada:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00.

The same statute, M.C.L. § 478.7(4); MSA 22.565(1)(4), also gives the commission the ability to waive the $10 fee under certain circumstances:

> The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

Thus, under M.C.L. § 478.7(4); MSA 22.565(1)(4), the fee charged as of November 15, 1991, was $10. While that fee may be waived, and thus not "charged or collected," for a particular carrier under a reciprocity agreement, such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. 11506(c)(2)(B)(iv)(III) is on the generic "fee" that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier.

The ICC's position that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov 15, 1991, as required by §11506(c)(2)(B)(iv)," [13] added a concept not

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[13] *Single State Ins. Registration* Exparte No. MC-100 (Sub-No. 6), 9 I.C.C.2d 610 (1993)

within the express language of the statute. It added consideration of voluntary agreements between the states to waive or reduce the fees imposed. It is not for the ICC, or this Court, to insert words into the statute.

IV

We hold that Michigan's reciprocity agreements are not relevant in determining what fee was "charged or collected" as of November 15, 1991. The lower courts erred in granting summary disposition for plaintiffs. We reverse the Court of Appeals decision, and remand this case to the Court of Claims for further proceedings consistent with this opinion.

CORRIGAN, C.J., and TAYLOR, YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

DISSENTING OPINION

MARILYN J. KELLY, J. (dissenting).

I disagree with the majority's conclusion that reciprocity agreements are not relevant in determining the registration fees that Michigan charged under the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506.[1] One such agreement waived registration fees for vehicles licensed in Illinois, including plaintiff's vehicles, so that no fee was collected or charged within the meaning of the statute. Consequently, I would affirm the decisions of the Court of Appeals and the Court of Claims.

The ISTEA replaced the bingo card system of registering interstate motor carriers with a single state registration system. *Nat'l Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm.*, 309 U.S. App. D.C. 325, 328, 41 F.3d 721 (1994). Under the ISTEA system, a state can charge a fee "that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III). The question in this case is what effect reciprocity agreements have on determining the fee that Michigan can charge under the single state registration system.

As an initial point, I disagree with the majority's conclusion that the meaning of the language in the statute is plain, reasonably susceptible of only one interpretation. Rather, I find it ambiguous. A statute is ambiguous when reasonable minds could differ as to its meaning. *In re MCI Telecommunications Complaint*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999). That the ISTEA is ambiguous as regards the reciprocity agreements is demonstrated by the several interpretations of its wording advanced by the parties and by justices on this Court. The language of the statute supports both positions, allowing for opposing and similarly plausible

[1] The ISTEA now appears at 49 U.S.C. 14504.

constructions. Despite careful attention and analysis, reasonable minds can and do differ with respect to the statute's meaning concerning reciprocity agreements.

Alternatively, if the statute's language were plain, the meaning of the words "collected or charged" must lead to a result opposite that reached by the majority. The majority concludes that Michigan was entitled to charge plaintiff a registration fee, but the majority's interpretation of the ISTEA depends on addition to the statute of words not present there. Whether the state of Michigan could have collected or charged a "generic" per vehicle fee is not pertinent. The statute specifies "fees . . . collected or charged as of November 15, 1991." It does not say "fees that the state could have collected or charged."

While the ISTEA does not expressly make reference to reciprocity agreements, the fee system in place on November 15, 1991, does. MCL 478.7(4); MSA 22.565(1)(4) provides:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

A plain reading of this provision leads to the conclusion that reciprocity agreements are an inherent part of the state's registration fee system. The generic fee levied under the statute is not absolute, but subject to reciprocity agreements that waive the fee. Thus, the fee charged as of November 15, 1991, was $10.00, unless a reciprocity agreement pertained. Voluntary agreements to waive the fee are relevant in determining the per vehicle fee system in place on November 15, 1991, as well as the fee collected or charged pursuant to that system.

The parties do not dispute that Michigan had a reciprocity agreement with Illinois that, by its terms, waived Michigan registration fees for interstate motor carriers licensed in Illinois. Pursuant to the agreement, the state did not charge registration fees for plaintiff's vehicles in 1990 and in 1991. It was not until Michigan revised its reciprocity system in 1991 that it charged plaintiff a registration fee.

This change in the reciprocity system did not become effective until the 1992 registration year. Plaintiff was not charged a registration fee in Michigan, nor was one collected from it in Michigan for the 1991 registration year. The fact that the state had a right to or could have charged a "generic" registration fee does not change the fact: it did not charge plaintiff a fee until the 1992 registration year.

The majority's characterization of the language of the statute as " plain" is belied by the fact that the majority is obliged to construe the phrase "collected or charged" to reach its result. Only a strained reading of "collected or charged" leads to the conclusion that the state charged a fee when it did not do so. That the statute does not expressly mention reciprocity agreements does not change the fact that reciprocity agreements were an inherent part of the fee system in place on November 15, 1991. In this case, the reciprocity agreement with Illinois in effect during the 1991 registration year caused Michigan to waive the fees it might have imposed under M.C.L. § 478.7; MSA 22.565(1). As a consequence, no fees had been "collected or charged as of November 15, 1991."

The Court should give deference, as did the District of Columbia Circuit Court of Appeals,[2] to the Interstate Commerce Commission's construction of the language in question, because it is based on a permissible construction of the ISTEA. *Chevron, U.S.A., Inc. v. Natural Resources*

[2] *Nat'l Ass'n of Regulatory Utility Comm'rs, supra.*

Defense Council, Inc., 467 U.S. 837, 842-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). It should affirm the decisions of the Court of Appeals and the Court of Claims in favor of plaintiff.

MICHAEL F. CAVANAGH, J. (dissenting).

I disagree with the majority's conclusion that the relevant provision of the federal Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506(c)(2)(B)(iv)(III), is unambiguous and that this Court is free to decide that the section does not take into account reciprocity agreements. Rather, I conclude that this provision is ambiguous, and that the Interstate Commerce Commission (ICC) has permissibly construed it to take into account reciprocity agreements. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), then, this Court should defer to the ICC's interpretation of that provision. I, therefore, would affirm the judgment of the Court of Appeals, and must respectfully dissent.

In this case, the Court is called on to review a federal statute that was administered by the ICC when this case arose.[1] As the majority points out, under the Supreme Court's decision in Chevron, when a court reviews an agency's construction of a statute the agency administers, the court faces a two-part inquiry. First, the court must determine whether the statute clearly and unambiguously expresses the legislative intent. If so, it then must give effect to the statute as written. However, if the statute is not clear and unambiguous, the court "does not simply impose its own construction on the statute," but instead reviews whether the agency has permissibly construed the statute. If it has, the court should defer to the agency's construction. *Chevron* at 842-843, 104 S.Ct. 2778. As alluded, the ICC, in *Single State Insurance Registration*, 9 I.C.C.2d 610, 618-619 (1993),

[1] The ICC was abolished in 1996, and the references to the ICC in the governing statute, which was recodified, were changed to refer to the Secretary of Transportation. See 49 U.S.C. 14505; see also PL 104-88, 109 Stat. 803, tit. I, § 103.

construed the statute in question to take into account reciprocity agreements that exempted some interstate carriers from state fees, a conclusion opposite to that reached by the majority.

To determine whether a statute clearly and unambiguously expresses legislative intent, courts begin with the statutory language. If the words of a statute are clear and unambiguous, the court must apply them as written, and no further judicial construction is required or permitted. See, e.g., *Tryc v. Michigan Veterans' Facility*, 451 Mich. 129, 135, 545 N.W.2d 642 (1996). However, when there can be reasonable disagreement over a statute's meaning, see *People v. Adair*, 452 Mich. 473, 479, 550 N.W.2d 505 (1996), or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, that statute is ambiguous. See 2A Singer, Statutes & Statutory Construction (6th ed.), §45.02, pp. 11-12. For example, this Court has concluded that statutes have been ambiguous when one word in the statute has an unclear meaning, see *Perez v. Keeler Brass Co.*, 461 Mich. 602, 610, 608 N.W.2d 45 (2000), when a statute's interaction with another statute has rendered its meaning unclear, see *People v. Denio*, 454 Mich. 691, 699, 564 N.W.2d 13 (1997), or when application of the statute to facts has rendered the correct application of the statute uncertain, see *Elias Bros. v. Treasury Dep't*, 452 Mich. 144, 150, 549 N.W.2d 837 (1996).

In this case, the majority concludes that the governing ISTEA provision is plain and unambiguous. In the words of our prior decisions, then, the majority concludes that there cannot be reasonable disagreement over the statute's meaning, and that reasonably well-informed people cannot understand the statute in two or more different senses. Before amendment, the governing section provided that the ICC, and through it, states

> shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates; (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . . [49 U.S.C. 11506(c)(2)(B)(iv).]

I cannot agree that the meaning of this language is clear and unambiguous. Rather, it is subject to reasonable disagreement.

The majority concludes that the fee "collected or charged" refers only to the fee system a state had in place on November 15, 1991, and that this is clear from the plain meaning of § 11506(c)(2)(B)(IV). *See* op. at — - —, 627 N.W.2d at 242. However, the conclusion that the fee "collected or charged" refers only to the fee system requires that "collected or charged" include the possibility that the fee "charged" can be simultaneously "waived." *Id.* at —, 627 N.W.2d at 242. Otherwise, there would be no question that the state had not collected or charged anything from plaintiff until the changes in the reciprocity system became effective in 1992, after the cutoff date provided in § 11506. The conclusion that a fee can be "charged," yet concurrently "waived," though, is not consistent with this Court's approach to plain language.

When construing a statute according to its plain language, unless the statute itself dictates otherwise, this Court generally turns to dictionary definitions of the statutory terms to find those terms' ordinary and generally accepted meanings. *See*, e.g., *Denio* at 699, 564 N.W.2d 13. Applying this approach to the instant case calls the majority's conclusion that a fee can be simultaneously "charged" and

waived into question. "Charge" is defined variably as (1) "To hold financially liable; demand payment from," (2) "To demand or ask payment," (3) "A financial burden, as a tax or lien," (4) "To set or ask (a given amount) as a price," (5) "Expense; cost," or (6) "The price set or asked for something." *The American Heritage Dictionary* (2d College ed, 1982).

The problem in this case is that the ordinary and generally accepted meanings of the term "charge" do not dictate the majority's conclusion. Rather, the definitions of "charge" present a spectrum of concepts ranging from those that might encompass the majority understanding that a fee can be "charged" but concurrently "waived"—definitions 4, 6, and arguably 5—to those that do not encompass that understanding because they require that the charge be a "demand" or a "burden." Definitions 1, 2, and 3 do not support the majority's conclusion because, under those meanings of "charge," the state would have to waive a fee, yet also hold a carrier financially liable for it, or demand or ask for payment of a fee that had been waived. Similarly, if a fee has been "waived," it is not a financial burden on the party responsible for the fee. In this case, plaintiff was not made financially liable for, or financially burdened with, the waived fee, and the state did not demand the waived fee before November 15, 1991. Thus, although several accepted definitions of "charge" support the majority conclusion, several others weigh against it.

As mentioned above, the meaning of a facially unambiguous term can be ambiguous in certain circumstances. *See Denio* at 699, 564 N.W.2d 13; *Perez* at 610, 608 N.W.2d 45. Thus, although "charged" may not at first blush appear ambiguous, in the context of a fee that was established in a fee system, but never demanded because of a reciprocity agreement, "charged" is ambiguous because the fee may or may not fit the definition of a fee that is

"charged." If the statutory term "charged" is narrow and requires a demand for payment, the state had not charged plaintiff the fees before November 15, 1991, and cannot charge plaintiff for later years. On the other hand, if "charged" is broad and requires only the setting of a fee, the state had charged the fee by the cutoff date, and plaintiff cannot avoid payment. Compare *Perez* at 610, 608 N.W.2d 45 ("refuses" could have a broad or narrow meaning).

Although it does so without explanation, the majority chooses the latter meaning, concluding that even when the fee was waived for particular carriers, it still had been charged in general. Op. at —, 627 N.W.2d at 242. I do not contend that the majority has chosen the wrong definition of "charge," or that its conclusion about § 11506's meaning is unreasonable. However, for the majority to come to its conclusion, it had to resolve the ambiguity surrounding the meaning of the statutory term "charged," specifically, whether "charged" was used in its broad or narrow sense.[2] Again, there is room for reasonable disagreement over the proper understanding of these statutory terms. That room for disagreement, though, indicates that we should defer to the ICC understanding. Normally, this Court has a duty to make such a decision. In

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[2] To conclude that the fee "charged" refers only to the fee set by the fee system, the majority must nevertheless conclude that "charged" is broad, meaning only that the state "set a price" for carriers but did not hold a carrier liable for that price. Such an understanding comports only with definitions 4 and 6 above, but not the narrower meaning of "charge" in definitions 1, 2, and 3. Otherwise, the fee "charged" could refer to only a particular fee and not the system itself.

Further, if the majority is correct that the fee charged refers only to the fee system in place, but not the fees charged of particular carriers, then apparently Michigan could waive fees for every carrier operating in the state, under reciprocity agreements or not, but nevertheless continue to be said to "charge" a generic fee. In such a scenario, the majority would apparently conclude that Michigan "charged" a fee even though it held no carrier financially liable for any fee.

this case, however, the different possible meanings of "charged" present an ambiguity in § 11506. Under *Chevron*, rather than this Court imposing its own construction on the statute, we must consider whether the ICC, the agency responsible for administering this statute and which has already resolved this ambiguity in § 11506, did so permissibly.

I conclude that the ICC did permissibly construe the statute, and, therefore, I would defer to that agency. In *Single State*, the ICC considered whether the freeze on registration fees enacted through the ISTEA should take reciprocity agreements into account. It decided that the ISTEA does take reciprocity agreements into account when freezing the fees that states "charged." Thus, an interstate carrier that was not charged any fees before November 15, 1991, because it was operating under a reciprocity agreement, could not be charged fees after that time. See *Single State*, supra at 617-619. This interpretation evidences that the ICC preferred the narrow approach to "charged," concluding that an interstate carrier had not been "charged" a registration fee unless a state had made a demand for the fee, or unless the carrier had been held financially liable for the fee. Under reciprocity agreements, states did not make demands for fees, and did not hold carriers liable for fees. Hence, carriers operating under those agreements were not "charged" before the cutoff date, and could not be charged after it. Though this Court may not prefer the ICC's interpretation of § 11506 or the narrow approach to the term "charged," in light of the different possible meanings of the statute, the ICC approach is certainly a permissible construction. I would, therefore, defer to that agency's interpretation of this section.

In sum, I disagree with the majority's conclusion that 49 U.S.C. 11506 is not reasonably subject to different understandings. Whether the statutory term "charged" is understood narrowly or broadly affects this statute's meaning.

Because the statute can be understood differently, this Court's only role is to consider whether the federal agency responsible for administering this statute, which has already considered the question before this Court, permissibly answered that question. The ICC took a narrow view of the meaning of "charged," but nevertheless a view that is supported by § 11506. I would defer to that agency's view and, therefore, must respectfully dissent.

APPENDIX C

MICHIGAN COURT OF APPEALS

Docket Nos. 194703, 195564.

YELLOW FREIGHT SYSTEM, INC.,
Plaintiff-Appellee,

v.

STATE of MICHIGAN, DEPARTMENT of TREASURY, STATE TREASURER, DEPARTMENT of COMMERCE, DIRECTOR of DEPARTMENT of COMMERCE, MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN PUBLIC SERVICE COMMISSIONERS,
Defendants-Appellants.

YELLOW FREIGHT SYSTEM, INC.,
Plaintiff-Appellant,

v.

STATE of MICHIGAN, DEPARTMENT of TREASURY, STATE TREASURER, DEPARTMENT of COMMERCE, DIRECTOR of DEPARTMENT of COMMERCE, MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN PUBLIC SERVICE COMMISSIONERS,
Defendants-Appellees.

Submitted April 14, 1998, at Lansing.
Decided Aug. 14, 1998, at 9:15 a.m.

Before RICHARD ALLEN GRIFFIN, P.J., and MCDONALD and O'CONNELL, JJ.

McDONALD, Judge.

Plaintiff, an interstate commercial carrier, brought this action asserting that defendants (the state) had collected registration fees pursuant to M.C.L. § 478.7(4); M.S.A. § 22.565(1)(4) in excess of the amount allowed by federal law, specifically the single-state registration system (SSRS). The Court of Claims, ruling on cross motions for summary disposition, agreed with plaintiff and granted its motion. The court entered judgment in favor of plaintiff for $99,580 plus interest and ordered that the state was barred from further collection of the registration fees until 49 U.S.C. "11506(c)(B)(iv) [sic] is rescinded." In Docket No. 194703, the state appeals this ruling as of right. In Docket No. 195564, plaintiff challenges the Court of Claims' denial of plaintiff's request for attorney fees. We affirm.

I

In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA), P.L. 102-240, which substantially amended 49 U.S.C. § 11506[1] and directed the Interstate Commerce Commission (ICC) to reform the licensing and registration system existing in the states. The statute mandated the creation of a new system, the SSRS. The statute required the ICC to prescribe amendments of the previously existing standards and set forth certain requirements for the new standards.[2]

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[1] 49 U.S.C. §11506 was amended and recodified and now appears at 49 U.S.C. §14504. To avoid confusion, we will refer only to 49 U.S.C. §11506.

[2] The registration system in effect before and after the ISTEA is explained in detail in *Nat'l Ass'n of Regulatory Utility Comm'rs v. ICC*, 309 U.S. App. D.C. 325, 41 F.3d 721 (1994).

The provision at issue, 49 U.S.C. § 11506(c)(2)(B)(iv)(III), stated that the amended standards shall establish a fee system that "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991."

The regulations promulgated by the ICC repeated the phrase "collected or charged as of November 15, 1991" without further explanation. *See* 49 C.F.R. §1023.4(c)(4)(ii) (1995), later redesignated as 49 C.F.R. §367.4(c)(4)(ii) (1996).

Because the statute essentially froze the fees a state could collect at the level existing as of November 15, 1991, the fee system in effect in this state at that time is pertinent to understanding the issues raised in this case. For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as "bingo stamps," for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to M.C.L. § 478.7(4); M.S.A. § 22.565(1)(4), the state had reciprocity agreements with certain other states so that each would waive the fees for vehicles from the other. The dispute arises in part because the state changed the method it used for determining reciprocity. For 1991, the state used the "base-plating system," which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit using the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business. The revised renewal applications were mailed to all interstate motor carriers in September 1991. Importantly, the 1992 fees to be "collected or charged" by the state were based on a calendar year and therefore were not due and owing until January 1, 1992.

The change in the method of determining reciprocity resulted in a substantial increase in the fees plaintiff owed the

state for the 1992 registration year. Under the base-plating system used for 1991, plaintiff paid the state $50 for five vehicles that were "base-plated" in Oklahoma, but paid nothing for 3,730 vehicles "base-plated" in Illinois and Indiana, because those states did not charge fees for vehicles based in Michigan. However, plaintiff's principal place of business is Kansas, which had no fee waiver agreement with Michigan. Therefore, for 1992, plaintiff paid $10 a vehicle, a total of $37,850 under the new system. Plaintiff sent, and the state received, the fees for 1992 before November 15, 1991. Plaintiff voluntarily paid its 1992 fees early in order to prevent any disruption of its trucking activities at the commencement of the January 1, 1992, calendar year.

II

The state argues the Court of Claims erred in determining that the state could not charge plaintiff $10 a vehicle. According to the state, it had "charged or collected" $10 a vehicle as of November 15, 1991. Plaintiff argued, and the Court of Claims agreed, the statute was properly interpreted to refer to the fees charged or collected for the 1991 registration year. We affirm the Court of Claims' decision with regard to this issue.

The Court of Claims' opinion indicates its decision was based on the ICC's decision in *American Trucking Ass'n Ins—Petition for Declaratory Order—Single State Ins Registration*, 9 ICC2d 1184 (1993). In American Trucking, the ICC discussed various issues that had arisen under the SSRS. The plaintiff sought clarification from the ICC concerning the statutory language. The ICC summarized the issue raised by the plaintiff in the following way:

> Yellow [Freight] raises the issue of whether the statutory language concerning the fee charged on November 15, 1991, relates to fees charged for the 1991 registration year or the 1992 registration year. (Under the "bingo" regulations, carriers filed applications between October 1

> and December 31 for stamps or identification numbers for the ensuing year.) Yellow points out that it paid a State zero fees covering 1991 operations and $10 per vehicle fees covering 1992 operations. However, Yellow paid the 1992 fees prior to November 15, 1991. It would have the Commission conclude that the focus of the statute is on the 1991 registration year and that the fee for 1992 is not germane.

The ICC resolved the matter as follows:

> Yellow has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991[,]" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find.

The state argues the court should not have followed American Trucking because it does not comport with the unambiguous language of the statute and renders the November 15, 1991, deadline a "nullity." Therefore, the state argues the decision was not entitled to the deference usually afforded an agency's interpretation of a statute that the agency is charged with enforcing.

This Court has recognized that deference should be given to the interpretation of a federal statute by the agency administering it and that following an agency's interpretation promotes uniformity in application by the states. *Gibbs v. General Motors Corp.*, 134 Mich. App. 429, 432, 351 N.W.2d 315 (1984). Where a statute is silent or ambiguous regarding congressional intent, a reviewing court "should defer to a federal agency's construction of the statute unless the agency's interpretation is unreasonable." *Walker v. Johnson & Johnson Vision Products, Inc.*, 217 Mich. App. 705, 713, 552 N.W.2d 679 (1996), citing *Chevron USA, Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Congress' intent concerning the allowable fee levels is not clear with respect to the pertinent period for fixing the fee levels. The phrase "as of November 15, 1991" denotes a period that ends on the specified date. However, the statute is silent regarding when the period begins. One could argue a state that had charged or collected fees from a carrier in any year before 1991 was entitled to continue to collect the fees under the SSRS. On the other hand, one could conclude, as the ICC did, that the relevant period was the registration year that included November 15, 1991. We do not believe Congress "had an intention on the precise question at issue. . . ." *Id.* at 843, n. 9, 104 S.Ct. 2778. Because the statute does not reveal congressional intent, we should defer to the ICC's interpretation unless it is unreasonable. *Walker, supra.*

We conclude that the agency's interpretation of the statute was reasonable. In our opinion, the agency acted reasonably in determining the fees should be fixed at the level in effect for the 1991 registration year, regardless of whether a new basis for determining reciprocity had been announced for 1992 or whether certain carriers had paid fees for 1992 before November 15, 1991.

Plaintiff's voluntary payment of fees not due and owing does not affect our analysis.

The state also contends the Court of Claims' ruling applying the *American Trucking* decision by the ICC "effectively repeals existing reciprocity agreements and/or alters them to reinstate a previous basis for determining fee waivers thereunder[,]" and thereby "contravenes the Tenth Amendment."[3] This argument has no merit. We disagree

[3] U.S. CONST., Am. X states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

with the premise of the state's argument, i.e., that the Court of Claims' decision repeals or alters any reciprocity agreements. Any effect on a state's ability to alter its reciprocity agreements is the result of Congress' decision to freeze fees at the level as of November 15, 1991. Congress has the authority to take this action under the Commerce Clause, U.S. CONST., Art. I, § 8.

The state argues the language in the *American Trucking* decision by the ICC was not binding on the state because the notice of institution of declaratory action resulting in that decision did not indicate facts specific to Michigan. We disagree. The Court of Claims did not conclude that the ICC decision in *American Trucking* was binding on the state. However, the court could not properly disregard the agency's interpretation of a statute merely because the state did not participate in the proceeding. The state has not provided, nor are we aware of, any authority holding that an alleged deficiency in the notice of institution of declaratory action affects judicial review of an agency's interpretation of a statute.

The state also suggests that states should not be required to consider reciprocity agreements in determining the amount of fees "charged or collected as of November 15, 1991." In *Single-State Ins Registration*, 9 ICC2d 610 (1993), the ICC determined that states must consider the reciprocity agreements. The ICC's decision in this regard was upheld in *Nat'l Ass'n of Regulatory Utility Comm'rs v. ICC*, 309 U.S. App. D.C. 325, 41 F.3d 721 (1994). Although that decision is not binding on this Court, we find it persuasive and adopt its ruling with regard to this issue.

III

We also reject the state's argument that governmental immunity, M.C.L. § 691.1407; M.S.A. § 3.996(107), bars plaintiff's action. The wrong alleged by plaintiff does not fall

within the definition of a tort. This action to recover fees paid in excess of the amount allowed by federal law is analogous to an action to recover illegal taxes. "The remedy to recover illegal taxes paid is in assumpsit for money had and received." *Service Coal Co. v. Unemployment Compensation Comm.*, 333 Mich. 526, 531, 53 N.W.2d 362 (1952), quoting *Salisbury v. Detroit*, 258 Mich. 235, 241 N.W. 888 (1932). An action in assumpsit for money had and received is not an action in tort. Therefore, governmental immunity from tort liability under M.C.L. § 691.1407; M.S.A. § 3.996(107) does not apply.

IV

The state also contends plaintiff was required to request a declaratory ruling from the PSC as a prerequisite to court review. We disagree. The state relies on both §§ 63 and 64 of the Administrative Procedures Act, M.C.L. § 24.263; M.S.A. § 3.560(163) and M.C.L. § 24.264; M.S.A. § 3.560 (164). However, neither section would support reversing the judgment entered in favor of plaintiff.

Plaintiff's action is not accurately characterized as simply an action for a declaratory judgment available under § 64. Rather, as previously discussed, the action was essentially an action in assumpsit for money had and received. Furthermore, only the validity or applicability of rules that had been formally promulgated as rules may be challenged in actions for declaratory judgments under § 64. *See Jones v. Dep't of Corrections*, 185 Mich. App. 134, 137, 460 N.W.2d 575 (1990). The state has not suggested that the collection of fees was pursuant to a rule that had been formally promulgated under the APA. Because plaintiff's action was not a challenge to the validity or applicability of a formally promulgated rule, § 64 of the APA does not require plaintiff to get a declaratory ruling as a prerequisite to judicial review.

To the extent that the state claims that plaintiff was required to get a declaratory ruling under § 63, we also find

that section inapplicable. Section 63 indicates that the agency "may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency." Assuming plaintiff could have requested a declaratory ruling, § 63 does not require plaintiff to do so before seeking judicial review.

V

We next address the relief that the court awarded to plaintiff, specifically, a refund of $99,580, which is the amount collected for 1994, 1995, and 1996. Arguing that a refund is contrary to the United States Supreme Court decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the state requests the remedy be limited to prospective relief commencing at the time of "any final appellate decision" on the issue.

Contrary to the state's argument, we believe that *McKesson* indicates that a refund is an appropriate remedy in this case. In *McKesson*, the United States Supreme Court considered whether prospective relief was an adequate remedy for wholesale liquor distributors who sought a refund of excess taxes they had paid pursuant to Florida's excise tax scheme. The scheme was found unconstitutional because it discriminated against interstate commerce. In determining the appropriate remedy, the Court concluded that due process required more than prospective relief:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. [*Id.* at 31, 110 S.Ct. 2238.]

The state cites *McKesson* for its discussion of the "pass-on" defense to an action for a tax refund. See *McKesson*, supra at 47-48, 110 S.Ct. 2238. The state suggests a refund is not necessary if the expense of the unlawfully collected fees was passed on to plaintiff's customers. However, the *McKesson* Court ultimately rejected the defense in that case, id. at 48- 49, 110 S.Ct. 2238. The state has not cited any authority indicating that the pass-on defense has been adopted in this jurisdiction, and we decline to adopt it in this case.

The state also cites *LCI Int'l Telecommunications Corp. v. Dep't of Commerce*, 227 Mich.App. 196, 574 N.W.2d 710 (1997), as support for its argument that plaintiff should receive only prospective relief. In *LCI*, this Court determined that the defendants had consistently misinterpreted a statute for over twenty years, resulting in improper assessments against telecommunications carriers. The Court held that its holding should be applied only prospectively, in part because the ruling was not "clearly foreshadowed." In the present case, the result was clearly foreshadowed by the ICC's decisions in *American Trucking* and *Single-State Registration*, which were issued in 1993, less than a year after the ICC adopted the SSRS.

The state also contends that, if this Court does not limit Yellow Freight to prospective relief, it should order a remand to the PSC to allow the state to change the fee schedule to retroactively surcharge carriers who benefitted from the state's misapplication of the SSRS. The state relies on language in *McKesson* suggesting that, as one of the alternatives to providing a refund to the aggrieved distributors in that case, Florida could assess and collect back taxes from the petitioners' competitors. *Id.* at 40, 110 S.Ct. 2238. However, the adequacy of any remedy necessarily depends on the basis for relief. In *McKesson*, the petitioners were entitled to relief because a statute imposing an excise tax

discriminated in favor of distributors of local products. The remedies the Court approved were ways Florida could undo the discriminatory effects of the statute and make the tax scheme valid under the Commerce Clause. In the present case, plaintiff is entitled to relief because the state collected fees contrary to a statute. Because the purpose of the relief in this instance is not to undo discriminatory effects, surcharging carriers who were allegedly undercharged is unrelated to providing plaintiff with an adequate remedy in this case. The only way to provide plaintiff with "meaningful backward-looking relief," *McKesson*, supra at 31, 110 S.Ct. 2238, to undo the misapplication of the statute is to order a refund of the amounts wrongfully collected.[4] We express no opinion whether the state may surcharge other carriers because that issue is not appropriately before us in the context of this case.

VI

In Docket No. 195564, plaintiff advances several issues relating to the court's denial of plaintiff's motion for attorney fees pursuant to 42 U.S.C. §1988. Although the court did not explicitly rule on the merits of plaintiff's claim under 42 U.S.C. §1983, we conclude that the denial of attorney fees was appropriate because the §1983 claim was not viable against either the state agencies or the state officials.

Case law indicates plaintiff could not prevail in a §1983 action against the state agencies. Section 1983 applies to "person[s]," and the United States Supreme Court has held that a state agency is not a "person" for the purposes of §1983. *Hardges v. Dep't of Social Services*, 201 Mich. App.

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[4] The holding in *McKesson* is limited to situations in which a state places a taxpayer under duress to pay tax promptly when due and limits the taxpayer to challenging the tax after payment. The state does not suggest that plaintiff was given the opportunity to challenge the fees before payment and does not suggest that a distinction should be drawn in this context between the payment of fees and taxes.

24, 27, 506 N.W.2d 532 (1993), citing *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), and *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

Plaintiff was not entitled to relief on the basis of its §1983 claim brought against the state officials acting in their official capacity. Section 1983 claims seeking prospective injunctive relief may be brought against state officials acting in an official capacity. *Will, supra* at 71, n. 10, 109 S.Ct. 2304; *Hardges*, supra. However, the United States Supreme Court has held that a state court cannot grant injunctive or declaratory relief under §1983 in state tax cases when an adequate legal remedy exists. *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm.*, 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

We are not persuaded by plaintiff's attempt to distinguish *Nat'l Private Truck* on the basis that the fees in this case were collected under federal law pursuant to a system implemented by the ICC. Plaintiff contends the principles of comity and federal deference to state authorities underlying the decision in *Nat'l Private Truck* are not relevant in this case. However, federal law does not require that states charge the fees, but rather sets forth the method and limits on states that choose to collect the fees. Plaintiff's contention, "No issues of state tax law or state tax administration are here involved," is disingenuous and does not provide a meritorious basis for distinguishing *Nat'l Private Truck*.

We also disagree with plaintiff's suggestion that the Supreme Court intended its decision in *Nat'l Private Truck* to be limited to taxes and therefore not apply to fees. On the basis of the principles of comity and federalism, the Supreme Court concluded that Congress did not intend §1983 claims to be brought in state tax cases when an adequate state remedy is available. Those principles apply equally well when the revenue collection is in the form of a fee.

VII

The Court of Claims properly granted plaintiff's motion for summary disposition. The state was precluded from collecting fees from plaintiff in excess of the amount charged or collected for the 1991 registration year. Plaintiff is entitled to a refund of the amount improperly collected. We also affirm the Court of Claims' denial of plaintiff's motion for attorney fees pursuant to § 1988 because plaintiff had no viable § 1983 claim against any of the defendants.

Affirmed.

RICHARD ALLEN GRIFFIN, P.J., concurred.

CONCURRING/DISSENTING OPINION

O'CONNELL, Judge (concurring in part and dissenting in part.)

I respectfully dissent from part II of the majority opinion. I find no ambiguity in the statutory provision in dispute and accordingly would instruct the Court of Claims to apply the statutory language according to its plain meaning and not according to the ICC's strained construction.

The primary goal of statutory interpretation is to ascertain and give effect to legislative purpose. *Haworth, Inc. v. Wickes Mfg. Co.*, 210 Mich. App. 222, 227, 532 N.W.2d 903 (1995). The language of the statute itself is the primary indicator of legislative intent. *Folands Jewelry Brokers, Inc. v. City of Warren*, 210 Mich. App. 304, 307, 532 N.W.2d 920 (1995). "If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted." *Dep't of Transportation v. Thrasher*, 196 Mich. App. 320, 323, 493 N.W.2d 457 (1992), aff'd. 446 Mich. 61, 521 N.W.2d 214 (1994).

The pertinent language in 49 U.S.C. § 11506 (c)(2)(B)(iv)(III) provides for establishment of a fee system that "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The majority reasons that this language calls for identifying a "pertinent period" ending November 15, 1991, but that it reveals no congressional intent concerning when this period begins. The majority then resolves this supposed ambiguity by concluding that the provision refers to fees charged for the registration year that includes November 15, 1991. However, this construction disregards the word "collected," and broadens the specific reference, "as of November 15, 1991," to indicate the whole registration year that happens to include "November 15, 1991." This distortion of the plain wording

of the statute is unnecessary and inappropriate. Legislative intent "is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v. General Motors Corp.*, 448 Mich. 147, 160, 528 N.W.2d 707 (1995). The ambiguity that the majority finds is the result of the majority's failure to accept the statutory wording at face value. When a statute is clear on its face, judicial construction is unnecessary and inappropriate. *Thrasher, supra.*

As the majority states, it was the intent of Congress to "freeze fees at the level as of November 15, 1991." To determine the particulars of that intent, I would restore "collected" as the companion of "charged," and respect the specificity of "November 15, 1991." A court should presume that every word has some meaning and avoid rendering any word nugatory. *Tiger Stadium Fan Club, Inc. v. Governor*, 217 Mich. App. 439, 457, 553 N.W.2d 7 (1996). Accordingly, I would read "fee . . . that such State collected or charged as of November 15, 1991" as fixing fee levels by reference to what the state charged on, or had actually collected by, November 15, 1991.

The statute does not refer to a "period" ending on November 15, but simply to that specific date. It does not refer only to the fee structure in place at the specified time, but to fees "collected or charged" at that time, identifying fees payable to the state, or already paid to the state (for whatever the reason), as establishing the level at which the fees are to be frozen. The words "as of" in reference to a specific date clearly refer to the status quo in place on that date. Thus, the congressional intent to freeze fees at the rates "collected or charged as of November 15, 1991" plainly recognizes for this purpose both the rates actually charged and those according to which fees were actually collected on that date.

Accordingly, because the state had collected plaintiff's fees as envisioned for the 1992 registration year "as of November 15, 1991," 49 U.S.C. § 11506(c)(2)(B)(iv)(III), by its plain terms, allows the state to continue to assess plaintiff's fees according to the new scheme under which plaintiff had tendered payment by November 15, 1991.

At stake here is the state's interest in collecting higher fees from plaintiff in accordance with recent changes in the state's regulatory scheme, and plaintiff's interest in avoiding those fee increases and continuing to operate under the old scheme. Each party argues that the other stands to receive a windfall if the other's interpretation of the statutory language at issue is adopted. That statutes have the effect, intentionally or not, of benefitting some and burdening others is not a matter of dispute, and the Intermodal Surface Transportation Efficiency Act is no exception. Under any interpretation of 49 U.S.C. § 11506(c)(2)(B)(iv)(III), someone will win and someone will lose. Although the state's reading of the statute to cause plaintiff to have to continue to pay much higher fees simply because plaintiff chose to pay 1992 fees before November 15, 1991, may seem a harsh result, the result is equally harsh if the state is obliged to forgo receiving the higher revenues to which its own laws entitle it simply because the federal statute articulated a date of late 1991 instead of early 1992. For these reasons, I would avoid any concern for who benefits, or who gets burdened, from 49 U.S.C. § 11506(c)(2)(B)(iv)(III) and simply give effect to its plain language.

Although I express no disagreement with the reasoning of part V of the majority opinion, I do not join in that part because it concerns the relief to which plaintiff is entitled, where under my reading of the statute in question plaintiff is not entitled to any relief. I concur with parts III, IV, and VI.

APPENDIX D

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Case No. 95-015706-CM

YELLOW FREIGHT SYSTEM, INC.,
Plaintiff,

v

STATE OF MICHIGAN, *et al.*,
Defendants.

Hon. William E. Collette
March 13, 1996

OPINION AND ORDER

FACTS

Plaintiff is a commercial hauler operating in interstate commerce throughout the United States. The State of Michigan has assessed a ten dollar ($10) charge, per vehicle, registration fee to Yellow Freight pursuant to 49 U.S.C. § 11506(c). Under this provision, states may assess the fee against interstate motor carriers only if such fee "is equal to the fee, not to exceed $10 per vehicle, that such state collected or charged as of November 15, 1991."

It is undisputed that, prior to the enactment of the above law, individual states were permitted to charge a fee to various carriers operating in interstate commerce. However, the state of Michigan had in place during calendar year 1991 a reciprocity agreement with various neighboring states, including Illinois, that waived imposition of the fee against motor carriers based in Michigan. It is undisputed that no registration fee was charged to Yellow Freight for calendar

years 1990 and 1991 because Illinois had agreed to waive the fee for Michigan motor carriers.

In December, 1991, the Intermodal Surface Transportation Efficiency Act went into effect after being signed by the President. Under this new law, each motor carrier would pay all assessed fees through its home state. Each home state was required to assess and collect fees charged by other states on their behalf.

Pursuant to the above, Yellow Freight dutifully paid its registration fees to the State of Kansas, its home state. In addition, it paid a ten dollar ($10) per vehicle fee to the State of Michigan under protest for calendar year 1994. Likewise, fees were paid under protest for 1995 and 1996.

Prior to the end of 1991, Michigan changed the basis for determining reciprocity. Formerly, the state of licensure of the vehicle was used for the decision. For 1992 and beyond the actual home state of the company was used. In this case, Kansas became the state for determination of reciprocity. As such, the fee was collectible since Kansas had no reciprocity with Michigan.

DECISION

Under the single state registration system enacted in 1991, and effective November 15, 1994, individual states could charge a fee, which does not exceed ten dollars ($10) per vehicle, equal of the fee collected or charged to the carrier as of Nobember15, 1991. In this particular case, there is no dispute that Michigan did not charge any fee to Yellow Freight for calendar year 1991 due to the reciprocity agreement with other states. It is equally clear that a ten dollar ($10) fee was charged to those carriers registered in states that did not waive the fee for Michigan carriers.

Michigan, in anticipation of the new legislation, through the Public Service Commission, changed its method of determining reciprocity prior to October, 1991. Under its

new formula for reciprocity, a carrier's principal place of business would be used to determine reciprocity rather than the state that licensed the trucks owned by the carrier. In this case, Kansas now became the state to be used in determining reciprocity for Yellow Freight in place of Illinois. As the state of Kansas did not waive fees for Michigan vehicles, a ten dollar ($10) fee per truck was charged to Yellow Freight. This fee was properly paid by the Plaintiff on October 3, 1991, for registration in 1992.

The Defendant has taken the position that while it is true that no fee was charged or collected for 1991, there was a fee in place for 1992 that was charged prior to November 15, 1991. Therefore, Michigan was perfectly within its rights in charging the ten dollars ($10) in 1994 and beyond. Plaintiff, relying on the same language of the statute, believes that since no fee was charged in 1991, the fact that a fee for 1992 was put in place should not allow collection of the fee. The issue to be resolved is to determine the correct manner of interpreting this language.

Under the Interstate Commerce Clause, federal law supersedes the authority of individual states to regulate interstate commerce. In this regard, the Interstate Commerce Commission has regulatory authority over the implementation of the various acts of congress controlling the smooth flow of commerce between the states. In interpreting the intent of congress, this Court believes it should give great weight to the interpretation of the law applied to the statute by the agency charged with its enforcement. In this regard, this Court believes that the decision by the ICC in its decision in the *American Trucking* case is dispositive of the issues to be decided here. In *American Trucking*, the issue herein was specifically raised and decided. The commission held that: Yellow has raised the issue of whether statutory language concerning the "fee charged or collected as of November 15, 1991," relates to fees charged for the 1991 registration year or

for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and so we find.

Based upon this interpretation, this court finds that the fees for 1994 though 1996 were improperly charged and are hereby ordered refunded.

Dated: March 13, 1996

/s/ William E. Collette,
WILLIAM E. COLLETTE, Circuit Judge

APPENDIX E

INTERSTATE COMMERCE COMMISSION
SINGLE STATE INSURANCE REGISTRATION
EX PARTE NO. MC-100 (SUB-NO. 6)

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9 ICC 2d 610, Fed Carr. Cas. ¶38,046

Decided May 10, 1993

Effective on May 18, 1993

The Commission is revising its regulations at 49 C.F.R. Parts 1023 and 1162 pertaining to registration by motor carriers with States in accordance with the requirements of the Intermodal Surface Transportation Efficiency Act of 1991. The new regulations replace a multi-State motor vehicle and operating authority registration system with a simplified, single-State insurance-based registration system.

BY THE COMMISSION:

Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, (ISTEA) substantially amended 49 U.S.C. § 11506—Registration of Motor Carriers by a State. The new law, at 49 U.S.C. § 11506(c)(1), requires that, not later than 18 months after its enactment, the Commission prescribe amendments to the standards now codified at 49 C.F.R. PART 1023-STANDARDS FOR REGISTRATION OF CERTIFICATES AND PERMITS WITH STATES.[1] In essence, the new law requires the Commission to replace the existing multi-State

[1] Under the law, the Commission is required to issue a final rule no later than May 18, 1993, that would take effect by January 1, 1994.

authority registration system with a single-State insurance registration system. The so-called "bingo card" program, under which carriers obtain stamps from multiple States, affix them to cards, and carry them in specific vehicles, is to be eliminated.

Amended § 11506 envisions a single State registration system under which a carrier: (1) files proof of insurance with a single registration State; (2) pays fees to that State to be allocated among all the States in which the carrier operates and which participate in the system; and (3) keeps in each of its vehicles a copy of the receipt issued by the registration State. Under the system, the fees collected by the registration State can be no more than the amount per vehicle charged or collected under the bingo card program on November 15, 1991. Notably, amended § 11506 requires that compliance costs be minimized.

In a decision served May 8, 1992, and an Advance Notice of Proposed Rulemaking (ANPR) published at 57 Fed.Reg. 20,072 (1992), we examined the new law and requested the public to participate in the formulation of new permanent regulations. After public comments were reviewed, we proposed new rules in a decision served January 22, 1993, and a Notice of Proposed Rulemaking (NPR) published at 58 Fed.Reg. 5951 (1993). We have likewise reviewed the comments received in response to the decision and NPR, and we now are adopting final rules.

The rules we proposed establish a base State insurance registration program as envisioned by the Congress. The rules include definitions of a limited number of critical terms, borrowing from the regulations used for the bingo card program. Motor vehicles are defined as those operated under authority issued by the Commission. As required by law, eligible States are those that participated in the bingo card program. Selection of a registration State is tied either to the carrier's principal place of business or one of the States where the carrier will pay the largest amount of fees.

The rules include requirements for registration derived from the statute. We proposed two alternatives for the registration receipt issued by the base State. Under the first alternative, a State would issue a single receipt that a motor carrier would copy and distribute to each of its motor vehicles. The proposed rule provided that receipts may not contain information regarding numbers of vehicles declared and/or States of operation. The second alternative would require the registration State to issue a single receipt and a number of official copies equal to the number of motor vehicles for which fees have been paid. Under this proposal, the receipt and copies would contain information identifying the carrier and specifying the number of vehicles declared and amounts of fees paid with respect to each participating State. A motor carrier would not be permitted to copy a receipt or an official copy of a receipt under the second alternative.

There are rules for accounting by registration States to assure standardized collection of fees by the base State and timely allocation of monies to and filing information with participating States. Finally, there are provisions for States to take appropriate action against persons or organizations that violate the rules.

THE COMMENTS

In response to our decision and NPR, we received 52 comments. (The commentors are listed in Appendix A to the decision). Included are 10 carriers and carrier organizations, 30 States and State organizations, seven insurers and insurer groups, two shipper groups, the U.S. Department of Transportation (DOT), and two consulting firms.

The National Conference of State Transportation Specialists (NCSTS) submitted extensive comments addressing many of the specific provisions of the Commission's proposed regulations. The National Association of

Regulatory Utility Commissioners (NARUC) and 22 State agencies specifically endorse or concur width NCSTS's comments. Approximately eight of those State agencies make some points different from those of the NCSTS. The American Trucking Associations (ATA) likewise submitted extensive comments voicing motor carrier concerns.[2] The commentors have raised numerous issues. For clarity, we will discuss the salient issues in two groups—the first involving issues and matters related to specific proposed regulations, and the second involving issues and matters not specifically related to them. (The final rules and the new uniform application form are set forth in Appendix B to the decision).

DISCUSSION AND CONCLUSIONS

At the outset, we will discuss the two issues that engendered the most comment and appear to be the most significant to all concerned: (1) who will be responsible for generating copies of receipts issued under §11506(c)(2)(B); and (2) must participating States consider fees charge under reciprocity agreements among the States when determining the fees charged as of November 15, 1991.

A. Issues and matters specifically related to proposed regulations.

Registration receipts—choice of alternatives. The statute is designed to advance two goals in setting up the State registration program: (1) it seeks to permit States to collect revenues based on the number of trucks a carrier operates; but (2) it seeks to minimize the administrative burdens on the carriers in compiling with the program. Our job is to set up procedures that will effect both of these goals. All

[2] Among the commenting motor carrier interests, North American Van Lines, Inc. (NAVL) and joint commentors American Movers Conference and Household Goods Carriers' Bureau (AMC/HGCB) indicate that they concur with the comments of the ATA.

commentors agree that the first step in the process of recognizing carrier compliance ought to be the preparation by the registration State of a document that will show that a carrier has paid the requisite fees. Where the commentors are deeply divided involves how copies of the registration documentation ought to be made so that they can be carried in each of the trucks registered by a carrier.

As indicated earlier, in the NPR we proposed two alternatives: one under which the registration State would issue a single document that could be copied by the carrier, and the second under which the registration State would provide each carrier with a number of "official" copies equal to the number of vehicles registered. The carrier interests favor the first alternative, on the ground that it would make it more difficult for carriers to evade the law by operating trucks for which fees have not been paid.

The ATA, focusing on the legislative history of the new law, argues that the only document that the statute permits a State to issue is the original receipt. (See §11506(c)(2)(B)(i).) The Interstate Truckload Carriers Conference (ITCC) avers that allowing the carrier to copy and distribute the receipt offers the most flexibility. Not only could a carrier place new vehicles into service without having to wait for official copies to be issued, it says, a carrier also would not have to take vehicles out of service while awaiting the replacement of lost official receipts. NAVL contends that the first alternative comes close to capturing the intent of ISTEA and embodies the approach currently being used by several State agencies with regard to other permits or registrations. The National Private Truck Council (NPTC) supports the first alternative, arguing that relieving carriers of the need to carry original documents removes a sizeable administrative burden.

The NCSTS strongly objects to the first alternative. It argues that its provisions fail to ensure the preservation of revenue or enforceability. The NCSTS avers that roadside

enforcement would be a nullity; a State officer would not be able to tell from a receipt whether a carrier had paid any fees for that State. It contends, also, that a complex audit procedure would be required to determine whether a motor carrier had paid sufficient fees for the number of vehicles operating in a State at any particular time. NCSTS also argues that the first alternative would present disadvantages for a carrier. If offered a load, a driver would not be able to determine from a receipt whether or not he was permitted to travel to a certain State, and a dispatcher might not have the information on hand to advise the driver in the matter. Alabama [3] finds the first alternative inconsistent with the language and intent of ISTEA. Minnesota declares that it is naive to expect complete voluntary compliance, which the first alternative would require. New York argues that allowing carriers to duplicate receipts serves no useful purpose and only provides an opportunity for carriers to circumvent legally required fees. In the view of Texas, the only practical distinction between the two alternatives is that the first does not protect against potential underreporting.

A number of commentors discuss audits in the context of enforcement. The ATA contends that up to 90% of the involved revenue will be paid by 10% of the carriers, a highly visible group that does not pose an enforcement or compliance problem. It asserts, then, that a system of audits would provide an effective means of enforcing fee obligations on smaller carriers. An on-site audit would compare fees paid with carrier records of vehicles owned and operated. AMC/HGCB asserts that States must be willing to enforce the system through an audit process. The American Bus Association (ABA) avers that carrier fraud and abuse are

[3] When referring to the State regulatory agencies participating in this proceeding, we will simply use the appropriate State names. The full names of the agencies are set forth in the list of commentors in Appendix A to the decision.

possible under both alternatives and can be prevented only by effective audit programs. The NCSTS, on the other hand, argues that Congress did not intend that an audit program be created, or it would have spelled out such a requirement in the legislation. Virginia asserts that, although the Commission found that the decision to conduct audits should be left to the States, were the Commission to adopt the first alternative for receipts, the public interest would require Virginia to institute an audit procedure.

Several motor carrier interests assail the second alternative for registration receipts. AMC/HGCB believes that the alternative does not meet ISTEA guidelines and is as cumbersome as the current bingo program. ATA argues that a system embracing the second alternative would be even more costly and burdensome than the bingo system. NAVL asserts that the second alternative would create substantial administrative burdens due to constantly changing fleet patterns.

The NCSTS favors the second alternative, with certain modifications. It asserts that the language of the statute requiring copies of receipts to be kept in each of a carrier's vehicles indicates that Congress intended the program to have an enforcement capability that would be expedient and simple. (See §11506(c)(2)(B)(ii).) NCSTS adds that the second alternative not only imposes a lesser burden than that of the bingo system, but it also involves a lesser burden than the International Registration Plan (IRP) procedure, which requires the routing of vehicle-specific identifiers to vehicles.[4] Texas points out that, under the second alternative, carriers would be relieved of the cost of making perhaps hundreds of copies of receipts to route to their vehicles.

[4] Whether the procedure NCSTS favors is more or less burdensome than the IRP procedure is irrelevant. The statute we are administering prohibits vehicle- specific credentials.

Several commenting insurer interests support the second alternative. The American Insurance Association (AIA) asserts that, without the detailed registration information required by the second alternative, it would be extremely difficult for a registration State to exert effective oversight. The National Association of Independent Insurers (NAII) contends that the second alternative mitigates the potential for fraud or error. Northland Insurance Companies (Northland) avers that the insurance industry needs the assistance of the Commission and the States to control receipts. It argues that carriers should not have the opportunity to make additional copies and run additional units without the insurer's knowledge and consent.

The National-American Wholesale Grocer's Association and International Foodservice Distributors Association (NAWGA) asserts that it is sensitive to States' concerns and would not object to the issuance of official copies so long as the receipt and copies would not be vehicle-specific. Consultant Halsey Traffic Services (Halsey) supports the second alternative. It asserts that anything short of a State-created credential for each vehicle permits too many opportunities and temptations to avoid significant fee payments.

We will adopt a modified version of the first alternative receipt proposal. The language of the statute calls for the base State to issue "a receipt." While the statute does not specify who is responsible for making copies of the receipt to be kept in each commercial motor vehicle, this language suggests that the only paper document a State is permitted to issue is a single receipt. Moreover, considerable guidance on the purpose and intended effects of the new single State registration system is available. Although the statute does not expressly preclude the Commission from facilitating State enforcement programs, the legislative history explains the Commission's primary role: the legislative history explains

that the new system is to be instituted by the Commission "in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible." H.R.Conf.Rep. No. 102-404, 102d Cong., 1st Sess. 440 (1991) (Conf.Rep.). A system in which the base State-issued receipt can be copied and distributed by a carrier to its trucks is the least burdensome way of disseminating the copy of the receipt that must be carried in each vehicle. In our view, permitting the States to issue a receipt along with an "official" copy of that receipt for each of the carrier's vehicles, while it might have an effect on roadside enforcement stops, would still not preclude carriers that wanted to do so from developing means to evade fees. Moreover, such an approach would seem to go beyond Congress' intention and venture into the realm of assisting State enforcement efforts that Congress did not specifically address. (Conf.Rep. at 439).

As required by § 11506(c)(2)(B)(iii), the receipt we are mandating will be non-vehicle-specific. Nevertheless, we will require certain information to be included in the receipt to assist those enforcing the law to determine that the carrier has registered as required by law. Therefore, we will provide, as suggested by NCSTS, that the receipt identify the carrier and specify the States for which fees were paid. By examining the receipt, the State official will know that the carrier has paid fees to register its fleet.

Congress intended to replace the burdensome bingo card system with an administrative process for collecting revenues that would be expedient and simple. We think that States will be fully capable of ensuring that carriers have properly registered their vehicles.[5] And while the information that we

[5] For example, the information provided to the States under IRP and IFTA may facilitate accurate counts of trucks operated in particular States. Moreover, participating States at their discretion may go further and, individually or collectively, audit carrier records, just as we do, to enforce compliance with the law.

will require on receipts will permit some very basic roadside enforcement, the requirements for issuing a receipt and prohibiting any other form of registration credential suggests that more extensive roadside enforcement was not contemplated. In short, we think that permitting carriers to copy their receipts will reduce the burdens on the carriers without substantially impairing the States' efforts to collect the proper fees.

There are other reasons to permit carriers to copy and disseminate the base State issued receipt. For example, such an approach would decrease burdens for carriers by eliminating delays when they add or replace vehicles and it would permit carriers more easily to replace lost or destroyed documents. On balance, we maximize the potential for cost savings and minimize the regulatory and paperwork burdens of the system by permitting the carriers to copy and disseminate the receipt issued by the base State.

Reciprocity Agreements. A number of States participating in the bingo program have been maintaining a variety of reciprocity agreements that have the effect of reducing fees for many carriers. Under these agreements, fees charged to carriers from other States are limited to the fees charged to home State carriers registered in those other States. The comments submitted in response to the ANPR and again in response to the NPR have raised the issue of whether States must consider the reciprocity agreements when determining the fees they collected or charged as of November 15, 1991, the date as of which the statute "freezes" fees. In our NPR decision, we found that the agreements were made voluntarily, and there was no good reason for our involvement in them. We noted, also, that it might place a heavy administrative burden on a registration State were we to require that it collect from different carriers different fees for the same State depending on the various reciprocal agreements negotiated by the various States in which each carrier operates.

The NCSTS does not discuss the issue. The motor carrier industry, on the other hand, discusses the matter extensively. The ATA argues that our proposal would allow States to collect revenues that would exceed what carriers were paying per vehicle under the prior program, contrary to the statute. The ATA asserts that States could realize windfall revenue gains from selective or wholesale rescission of reciprocity agreements. Although retention of the agreements would make fee calculation somewhat more complicated, the ATA asserts, it would not do so to an extent likely to burden either States or the trucking industry. It avers that the terms of agreements in effect as of November 15, 1991, can easily be ascertained and disseminated. The ITCC argues, simply, that fees were frozen by law, and the Commission cannot sanction fees higher than those that were charged or collected. NAVL argues that our ruling would discriminate against States that had only a single fee level; the fees of such States are frozen, but the fees of other States (that participated in various reciprocity agreements) could be raised to $10.

Yellow Freight System, Inc. (Yellow) points out that, on November 15, 1991, Nebraska was charging between $0 and $10 per vehicle. It asserts that carriers from 9 States were charged $10, and carriers from 24 States were charged $1 or less. The fees owed by the latter carriers assertedly could increase as much as 900% to $10 or at least to the actual fee charged by the State. Atlas Van Lines (Atlas) avers that, if States were allowed to eliminate their reciprocity fee structures, Atlas's per unit costs would increase by $55. The Regular Common Carrier Conference (RCCC) argues that, in the worst case scenario, State revenues could increase from $50 million to $200 million, inconsistent with the spirit of ISTEA.

We have concluded that our prior proposal regarding this issue did not carry out the letter of the law that fees be frozen as of November 15, 1991, or the intent of the law that the

flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced. As the motor carrier interests point out, were States to discontinue their reciprocity agreements, per vehicle fees for many carriers could increase greatly, and some States would realize windfalls. While we have not made any independent calculations of exactly how fees would escalate, it is clear that they could rise above the levels permitted by the law. Although the variety of reciprocity agreements might make collection of a range of fees cumbersome for some registration States, the potential burden on the States would be outweighed by the likely cost to carriers that could result were we to adhere to our prior position. In brief, we have concluded that participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991, as required by §11506(c)(2)(B)(iv).

Definitions. Our proposed definition of motor vehicle did not include a weight threshold, but rather focused on vehicles that were operated subject to ICC jurisdiction. A number of motor carrier interests would exclude vehicles of 26,001 pounds gross registered vehicle weight or less from the registration program. These commentors assert that this approach would be consistent with the approach used in the International Registration Plan (IRP) and the International Fuel Tax Agreement (IFTA) programs. The ITCC argues that, as records for lighter vehicles are not kept in the same manner as for larger, revenue-generating vehicles, the adoption of the requested threshold would conform to the legislative intent to eliminate paperwork. ATA requests that, as an alternative, the Commission consider the 10,001 pound threshold that DOT uses in its safety regulations. The NCSTS favors the proposed definition.

We do not believe it appropriate to add a weight threshold to our proposed definition. The bingo card program had no

weight threshold for covered vehicles. Imposing a weight threshold now would remove many vehicles from the registration plan's coverage. In enacting the new law, Congress did not evidence any intent to reduce the number of vehicles covered. Rather, one of its stated intentions was to preserve revenues for the States that had participated in the bingo program. To adopt either a 26,001 pound or a 10,001 pound threshold would reduce State revenues, contrary to the Congressional intent.

Under our proposed regulations a carrier would select as its registration State the State in which it maintains its principal place of business. The NCSTS believes that it is important for the Commission to define "principal place of business". (We will discuss arguments concerning the selection criteria below.) We agree with the NCSTS that the term should be defined. The carriers' principal place of business will be defined as the "single location that serves as a motor carrier's headquarters and where it maintains or can make available its operational records."

Participation by States. Under the new law only a State that as of January 1, 1991, charged or collected a fee under the existing 49 C.F.R. § 1023 provisions is eligible to participate as a registration State under the new program. We proposed that, to be eligible to participate as a registration State and to receive fees, a State must continuously participate in the program beginning with the effective date of the regulations. NAWGA supports the proposal, stating that it would be burdensome to carriers if States were permitted to drop out and rejoin the program freely. The Travelers Insurance Company (Travelers) agrees with the continuous participation proposal and recommends adding language to the rules specifically prohibiting reentry after leaving the program.

On the other hand, the NCSTS asserts that it, the ATA, the RCCC, NARUC, and the insurance industry agree that States

should have the option to enter and exit the program with notice. The NCSTS contends that Congress did not intend to limit States' participation at any time.

On further reflection, we conclude that the legislation does not require eligible States to participate in the new program from its inception and continuously thereafter, and as the States, carriers, and insurer groups appear to have agreed that it would not be burdensome to give States the requested flexibility, we will modify the proposed regulations by deleting this extra-statutory restriction. We will also modify the notice provision of the section to reflect the fact that, for any given registration year, States might commence, as well as cease, participation in the program.

Selection of Registration State. As we explained in the ANPR decision, central to the new law is the concept of single State registration. A carrier will register with only one State, which will allocate the fees it collects among the participating States in which the carrier operates. In the NPR we proposed that a carrier would select the State in which it maintains its principal place of business, if the State is a participating State. A carrier that maintains its principal place of business outside a participating State (including a Canada-based carrier) would select the State (or one of the States, in case of a tie) to which the largest amount of its fees during the next registration year would likely be allocated (based on the number of vehicles it intended to operate multiplied by the fee for that State). We determined that a system allowing free choice could force some States to bear disproportionate burdens. The ATA complains that the proposed selection process does not give carriers the operational flexibility they need. The ATA, ITCC, and NAVL support the use of a selection process similar to that used in the IRP. Under the IRP, a carrier can select "the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet, and where

operational records of such fleet are maintained or can be made available * * *." (ATA comments filed February 24, 1993, at 14.) We continue to believe that such a selection process would be unacceptably broad and that our rule will promote simplicity, flexibility and stability. The ATA argues that its recommended method is less likely to promote base State shopping than is the Commission's. We disagree because "principal place of business" is a certain location while "established place of business" could possibly include every State.

On the other hand, we agree with comments of Wisconsin and consultant Joy B. Fitzgerald to the effect that the carriers' second option, involving the largest amount of fees to be paid, can be confusing and not necessarily a reflection of a carrier's presence in a State. We will modify the rules to provide that, if a carrier maintains its principal place of business outside a participating State, it must select the State in which it expects to operate the largest number of motor vehicles during the next registration year. We also will add language clarifying the fact that a carrier may choose between States when it determines that it plans to operate the same largest number in more than one State. We must clarify a point here: a carrier will make its second option determination only one time, not each year. A carrier will be permitted to change its registration State only if it moves its principal place of business or its registration State drops out of the program.[6]

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[6] North Dakota fears that States bordering Canada will be chosen as registration States by most of the Canadian carriers and will be forced to absorb a disproportionate share of the workload involved in administering the program. We advise North Dakota and similarly situated States that, should such a problem occur, they can petition for modification of the rules, and we can address the problem based on a record fully developed with regard to the issue.

Finally, the NCSTS objects to the Commission's proposed provisions requiring a carrier to give notice of its selection to the State Commission of its selected registration State. The NCSTS proposes a rule under which a carrier must notify only a prior registration State that it has selected a new registration State. As the NCSTS does not point out any problem with the Commission's proposed rule, and as its proposal does not give notice to a new registration State, we decline to modify our proposed rule in the manner requested. We find merit, however, in NCSTS's suggestion regarding carriers that must change registration States. We will modify our proposed rules to indicate that, if a carrier changes its principal place of business during the annual registration period, it may continue to use its prior registration State for the next registration year.

Requirements for Registration. We proposed that the annual filing period should run from October 1 through November 30. The NCSTS and the ATA agree that the annual filing period should be a longer 4-month period running from August 1 through November 30. We see no problem with this extended filing period, and we will make an appropriate modification to our proposed regulation.

NCSTS does, however, suggest several other provisions in this area that we are not adopting. This commentor would have the filing period begin in 1994, leaving no regulations in place to govern filings for the 1994 registration year. The NCSTS also proposes regulations requiring States to process applications either within 30 days or in a timely manner, depending on when the applications are received. The old bingo regulations did not have provisions of this nature, and they are even less necessary here. The filing period begins earlier and lasts longer than the old filing period and (as the receipts are not vehicle-specific) it will take less time for carriers to route receipts to their vehicles than it did to route bingo cards. We believe it will be sufficient to insert language

in § 1023.5, governing receipts, requiring States to issue the receipts within 30 days. We expect that, in the event States do not send out their receipts in a timely manner, they will postpone enforcement and notify the other participating States of the delay.

In our ANPR decision we indicated that we read § 11506(c)(2)(A) to mean that the registration State may choose not to require the filing of evidence of certificates and permits and the names of process agents. On reexamining the language of the statute, we concluded in our NPR decision that a registration State does not appear to have been given the discretion as to the items it can require a carrier to file. We explained that, as each registration State must serve as an information collecting agent for other States, it would be unfair to allow registration States to choose the information they will collect and allowing them to do so would promote inconsistencies contrary to the desired end of uniformity. We noted that the burdens our rules would impose are minimal, as for the most part, carriers will simply file with the States copies of the forms they file with the Commission. The Owner-Operator Independent Drivers Association, Inc. (OOIDA) argues that carriers should not be required to file copies at all. We previously have found that the law requires such a filing. The NCSTS objects to the Commission's proposed provisions allowing carriers to file summaries of authorities with the permission of their registration States. This commentor contends that the proposed language allows individual States to have unique or differing requirements, hampering uniformity to the detriment of carriers and States. We do not see how the provision could have the adverse effect NCSTS suggests, and, moreover, we do not see a legitimate link between the more detailed information the NCSTS would have carriers file and the essential purposes of the registration program. Accordingly, we decline to modify our proposal in this area.

Insurance. The proposed rules require the carrier to file a copy of its proof of public liability security with the registration State. A number of commentors assert that it is the insurer, not the carrier, that typically files the proof with the States and should continue to do so under the new rules. The NAII points out that, for security reasons, some insurers prefer to submit the financial responsibility certificates directly. Northland avers that placing control of insurance documents in the hands of carriers lends too much opportunity for mishandling and abuse. The points are well taken; however, as the Commission does not have jurisdiction over the insurers, we cannot order them to file anything with the States. To accomplish the desired end, we will insert language in the regulations indicating that a carrier must file or "cause to be filed" its evidence of insurance. We expect that, pursuant to agreements between carriers and their insurers, it generally will be the insurers that will make appropriate insurance filings with registration States.

A number of the commenting State interests are concerned that the Commission's proposed regulations would allow a carrier to file a copy of its proof of public liability security. These commentors want to receive original certificates of insurance from insurers. The NCSTS argues that, without original certificates, States lack reliable documentation. A copy, it asserts, is not binding on the insurer. In Minnesota's view, a copy gives no assurance that the carrier actually has liability coverage. We disagree. The fact that a State receives a true copy of a certificate of insurance, rather than an original, makes no practical difference. Typically, insurance companies create carbon copies while they are creating originals, and the States receive true copies of the documents that insurers file with the Commission as required by our insurance regulations at 49 C.F.R. Part 1043. Significantly, the commentors' arguments in this area ignore that, under the registration plan, carriers simply are to show that they are in compliance with the Commission's insurance

requirements. As Travelers points out, the insurance filing with the States is for information purposes only; there will be a properly completed certification at the Commission.

The NCSTS is concerned with what it perceives as inconsistency among some of the insurance forms referenced in our insurance regulations. The NCSTS indicates that it is satisfied with the content of the forms BMC 91 and BMC 91X certificates of insurance, but that the endorsement form MCS 90 cross-referenced in the BMC forms appears to limit the liability of the insurer to the amount of coverage specified in the blanks of the form MCS 90, whether those limits are those required by Federal law or not. (See 49 C.F.R. § 1043.7(a).) We note that this concern goes well beyond the scope of this proceeding, but in any event there is no basis for NCSTS' concern. The form MCS 90 is a jointly approved ICC-DOT endorsement that DOT requires carriers to keep at their principal place of business. Because DOT does not receive certificates of insurance, only the endorsements, insurers must indicate limits provided on the MCS 90 forms they file with DOT. This is done to meet DOT's proof of insurance requirements and has no bearing on this Commission's requirements. Carriers do not file the MCS 90 forms with this Commission, and coverage limits set forth therein do not affect the coverage limits in the BMC-series forms filed with us.

Some commentors request the Commission to recognize specifically that insurance coverage is continuous until canceled and to eliminate from our proposed regulations requirements for annual insurance filings. We are aware that the motor carriers' insurance coverage is continuous until canceled; our insurance regulations reflect this fact. (See 49 C.F.R. § 1043.7(a)(6).) Our proposed regulations do not require annual insurance filings, only a simple certification or statement by the carrier to the registration State that its insurance remains in effect. This is analogous to the

certification an individual makes each year when renewing a vehicle registration.

The NCSTS and individual States including Colorado, Missouri, and Wisconsin believe it is important that States receive notices of insurance cancellations. We see no problem with the request, and we will modify our proposed rules by inserting a provision requiring carriers to cause cancellation notices (as well as notices of replacement) to be timely filed with their registration State. We remind the commentors, however, that the 30-day cancellation notice period specified in 49 C.F.R. § 1043.7(d) runs from the date notice is received by the Commission, not the registration State.

Filing Fees. Regarding the calculation of filing fees, the Commission proposed that carriers declare the numbers of vehicles that they intend to operate in each participating State during the next year. However, we invited comments on a system under which carriers would report the number of vehicles operated in each participating State during the preceding year. AMC/HGCB, ATA, ITCC, and some carriers commented in favor of standards requiring the calculation of fees on a historical basis. The ATA asserts that the IRP uses historical operations as a basis for apportioning fleet registration fees and that the procedure has proven itself over 20 years. Estimating future operations, it asserts, would require a carrier to make continual adjustments during a year or simply to overpay to assure compliance and then later to apply for refunds. The ITCC avers that historical operations are documented, reconcilable with other plans, and offer a defined basis for payments, collections, and audits. The NCSTS, on the other hand, agrees with the proposed rule requiring reporting and submitting fees for the number of vehicles a carrier intends to operate during the next registration year.

As we indicated in our NPR decision, the "intends to operate" standard has been successfully used in connection

with the bingo stamp program for many years. No one in the comments has demonstrated any significant problems with the approach. As the approach has apparently worked well, and as Congress did not express any intent to change it in ISTEA, we are not inclined to shift gears at this point. With the flexible receipt system we have adopted, adding vehicles should not be a problem.

Registration Receipts—Specific Provisions. Commentors among the State interests, primarily the NCSTS, offer a number of suggestions for modifying our proposed rules. Many of the suggestions have merit.

First, regarding the content of receipts, the NCSTS requests the Commission to delete proposed language concerning numbers of vehicles declared and fees paid with respect to each State. It asserts that showing the amount of fees paid does not assist in roadside enforcement. Fee information and numbers of vehicles will be recorded at the time the application is filed. This commentor proposes that receipts simply identify the carrier and specify the States for which fees have been paid. This suggestion appears reasonable and will satisfy the requirements of the law. Accordingly, we will adopt a provision consistent with that recommendation.

We proposed that registration States issue unified receipts and official copies containing the information pertaining to all annual and/or supplemental registrations covering a particular registration year. The NCSTS requests that we delete the proposed provision. It asserts that the burden on States and carriers to collect superseded receipts would be substantial and that, conversely, the burden on carriers to attach supplemental receipts to prior receipts would be minimal. In view of the fact that carriers will be making copies of all receipts, we see merit in this position and will delete the provision.

The NCSTS would have us delete our proposed provisions regarding time frames for the issuance of receipts. As we indicated above in our discussion of registration requirements, we will retain provisions requiring the timely issuance of receipts issued pursuant to filings made during the annual registration period. We also will retain a provision requiring all other receipts to be issued by the 30th day following the date of filing of a fully acceptable supplemental registration application. These requirements are reasonable and consistent with both the registration requirements of §1023.4 and the provisions regarding temporary permits, discussed immediately below.

The NCSTS proposes that we adopt a suggested expedited procedure to govern situations in which carriers have an urgent need to add equipment or States of travel. We see no problem with the essence of the request, and we will adopt a rewritten version of the suggested new subsection.

The NCSTS objects to the Commission's proposed provision permitting carriers to transfer copies of receipts between their motor vehicles. It asserts that a carrier should not be permitted to transfer a receipt from a vehicle for which fees have been paid to one for which they have not, unless the transfer is from a vehicle taken out of service to its replacement vehicle. We will delete this provision now that carriers will be making copies of receipts, and all receipts would be identical.

The NCSTS also objects to our proposed provision which, in essence, requires a registration State to replace a lost or stolen receipt or official copy without charge. In view of the fact that carriers will be making copies of all receipts, we will delete this provision.

Finally, the AIA objects to the proposed title of § 1023.5, "insurance receipts." It contends that the receipts evidence payment of a registration fee, not payment for insurance. We

agree and have changed the title of § 1023.5 to "registration receipts."

Registration State Accounting. We proposed regulations governing recordkeeping involved in allocating and distributing fees collected by participating States. The NCSTS finds the provisions acceptable. Kansas and Wisconsin are the only other commentors to address the provisions of the section. Generally, they recommend some minor modifications that we deem unnecessary or unacceptable. Wisconsin would have the Commission adopt regulations governing carriers' retention and furnishing of records. We believed it necessary and appropriate to promulgate provisions governing the manner in which participating States would account to each other under the new program. We did not, and do not, believe that it would be necessary or appropriate to adopt regulations governing carrier records. To the extent that current Commission regulations in this area are inadequate, States may adopt appropriate administrative procedures, so long as they do not unreasonably burden interstate commerce.

State penalties and sanctions. Only the NCSTS and the ATA comment on the proposed § 1023.7, which declares violations of the regulations unlawful and allows States to impose criminal penalties or civil sanctions on violators. The NCSTS finds the language of the provision acceptable. On the other hand, the ATA contends that there is nothing in the statute authorizing the delegation of enforcement of the regulations to the States.

We find no merit in the ATA's contention, and we dismiss it. It is true that § 11506 is silent in this matter, but so was the predecessor § 11506. The proposed regulatory provision simply mirrors its predecessor provision, regarding which we are unaware of any complaints. The States do not need legislation at the Federal level to enable them to exercise their proper police powers in this area. As the States will be

running a registration program, it appears reasonable that they be able to adopt regulations and statutory provisions covering the program, so long as there is no conflict with Federal law or regulations.

B. Issues and matters not specifically related to proposed regulations.

Insurer qualification. In our NPR decision, we addressed and dismissed arguments that individual participating States, or even States acting in their capacities as registration States, have the authority to require that a carrier operating within their jurisdictions be insured by a company licensed or admitted to do business in such jurisdictions. We stated, at page 12 of our decision,

Under 49 C.F.R. § 1043.8, the Commission will accept a certificate of insurance or surety bond issued by an insurance or surety company authorized to do business (licensed or admitted) in any State. The Commission requires a carrier to comply with the provisions of Part 1043 before it will issue the carrier a certificate or permit. Under ISTEA, a carrier must file evidence of its certificate and/or permit and proof of required insurance or qualification as a self-insurer. Clearly, the law refers to certificates and permits issued by this Commission. Concomitantly, the law refers to proof of the type of security that this Commission requires before it will issue a certificate or permit. Thus, under ISTEA and our proposed regulations, a carrier may file proof of insurance or surety issued by an insurance or surety company authorized to do business in any State.

DOT and NAWGA endorse the Commission's conclusions in this area, as does insurer Erie Insurance Exchange (Erie). Erie is concerned by several States' contrary positions, and it advocates placing language directly in the regulations to lay to rest any doubt that a motor carrier may choose to be insured with any licensed insurance company.

Several States still contest the matter. Alabama argues that States have a legitimate interest in verifying that insurers that underwrite liability coverage for motor carriers have adequate financial resources to satisfy claims arising from those carriers' operations. Alabama contends that Congress never intended for ISTEA to circumvent the ability of each State electing to participate to impose its insurer or surety eligibility requirements. In its view, each participating State should have the latitude to reject a carrier's registration if the State determines that the carrier's insurer is not authorized to conduct insurance business in its jurisdiction. Alabama cites §1023.55 of the bingo regulations, which states that "the provisions of this subpart shall not be construed in any way to affect the qualifications of an insurer or surety as prescribed by State law." Allowing each participating State to continue to enforce its insurer requirements, Alabama asserts, would not result in any new burdens on interstate commerce.

The bingo regulations were prepared and certified by NARUC, and, under old § 11506, the Commission had no option but to prescribe NARUC's regulations. A conflict between the bingo regulations and our insurance regulations arose, despite the fact that old § 11506(e) specifically stated that, "this section does not * * * authorize standards in conflict with regulations of the Commission." We are aware that carriers and their insurers avoided the conflict, and at least nominally complied with State insurance requirements, by means of schemes using fronting companies and reinsurance plans.

Stratagems are no longer required. Commission regulations are clear, as is ISTEA's mandate for a simple, single—State registration system. Once a carrier has met the Commission's requirements for authority to operate in interstate commerce, it must be allowed to operate. As our regulations which require only that insurers be licensed in some State, are clear regarding this matter, we do not see any need to promulgate regulations addressing this point.

California points out that States' standards for licensing and admitting insurance and surety companies are not necessarily comparable. It fears that insurers and sureties can seek out less demanding States. It asserts that more lenient State standards translate into lower premiums for carriers. It concludes that potential claimants may not be adequately protected if the least expensive insurance also is the least funded. In these premises, California argues that it would be reasonable for the Commission to spell out the basic standards we apply to insurers and sureties. It contends that we should establish and publish capitalization and liquid asset requirements for insurance and surety companies.

The Commission formerly maintained financial resources standards; however, in *Insurance Procedures and Minimum Amounts of Liability*, 133 M.C.C. 273 (1983), we determined that the financial resources standard no longer served a useful purpose and unnecessarily duplicated State regulation. The question of financial requirements was again raised in *Revision of Regulations—Insurance & Surety Companies*, 7 I.C.C.2d 589 (1991) (Revision of Regulations). We queried whether we "should return to our pre-1983 approach of reviewing the financial soundness of each insurer" (*Revision of Regulations*, 7 I.C.C.2d at 597.) and discussed whether to reestablish a program of independently reviewing the financial soundness of insurance companies. However, we determined that, "[w]e continue to believe such a program is not necessarily in the public interest * * *." (*Id.*, at 611.) The Commission affirmed its continuing opinion that such reviews would be "unnecessarily duplicative of long-standing state, procedures." (*Id.*)

We advise California, and those States that share its concern, that, should they believe the insurer qualification standards of fellow States to be too lenient, they can request those States to change those standards. But we see no basis for changing our basic insurance regulations, which are not directly at issue in this proceeding.

Insurance industry concerns. AIA is concerned that language in our NPR decision suggests that insurers still could be expected to provide information to States other than pertinent registration States. AIA believes that, under ISTEA, no State other than a registration State can require proof of insurance or of cancellation, either directly or indirectly. Similarly, Erie is concerned that the proposed regulations may suggest to some States that, so long as they are not participating States, they may impose insurance requirements in excess of those permitted by the regulations. Erie fears that some States might believe that they can avoid ISTEA's Federal preemption of their insurance requirements simply by declining to participate in the program. AIA and Erie request that the Commission modify its proposed regulations to specify that they govern the activities of all States, participating and non-participating States alike. On the other hand, Oregon, which is not eligible to participate in the program, complains that there is nothing in the proposed rules that provides for Oregon or other non-participating States to receive notice that a carrier has insurance coverage that meets Commission prescribed limits or that an insurer intends to cancel insurance coverage. Oregon wants the Commission to amend the proposed rules so as to require filings with non-participating States.

The insurance industry commentors are unduly concerned. We advise them and the public that the States' ability to require anything of Commission- regulated motor carriers is circumscribed by ISTEA, our existing insurance regulations, and the new registration regulations we are issuing here. Only States that are eligible to participate, and that in fact participate, may request insurance filings, and the regulations describe what the States may request and when they may request it. Any insurance-related requirements of interstate carriers by non-participating States (as well as any demands by participating States) beyond those permitted by our regulations constitute impermissible burdens on interstate

commerce under the law. This would include attempts by the State to impose fees for the registration or filing of evidence of insurance, either directly upon the carriers or indirectly upon insurance companies or middlemen such as custom brokers where reimbursement is obtained from the carriers. We believe that the proposed regulations are sufficiently clear in this regard, and we see no reason to modify them. States such as Oregon that want insurance information can contact the Commission. Our new automated telephone response system facilitates their obtaining the information they require.

AIA and Travelers are concerned with burdens imposed by intrastate filing requirements. In particular, they complain of having to file two different financial responsibility certifications for the same motor carrier with the same State. They ask the Commission to declare that a State's insurance filing requirement for intrastate operations by an interstate carrier cannot be more restrictive than its filing requirement for interstate operations by the same carrier.

We have no jurisdiction to regulate filings for intrastate operations. If such filing requirements are thought to pose a significant problem warranting Federal action, legislation would be necessary to give the Commission appropriate preemptive authority.

AIA, Northland, and Travelers point out that there are thousands of outstanding Form E insurance filings made under the bingo rules. (See Subpart E and the appendix to the predecessor Part 1023.) They query whether they will have to cancel the filings individually, or whether the Commission will in some manner authorize a blanket cancellation. AIA suggests that, to reduce potential confusion, costs, and litigation, we adopt provisions rendering all existing Form Es or other certificates of insurance null and void, either as of the time the registration States receive new proof of insurance filings, or as of the end of the day on December 31, 1993.

Form E, as well as all the other insurance-related forms set forth in the bingo regulations, drew life from those regulations. Beginning with the effective date of the new regulations, the old bingo regulations will cease to exist, and, necessarily, there will be no regulatory basis for the old forms. Therefore, considering that the new registration year will begin January 1, 1994, we hereby declare that the forms described in the superseded rules are canceled effective 12:01 a.m. January 1, 1994. (We recognize that this rulemaking has no effect over the forms States may require for intrastate filings, but States may no longer use such forms for interstate registration if they are inconsistent with the requirements of this rule.)

AIA deems it critical that our final rules declare that any insurance information flowing from the registration State to the other participating States is not doing so by legal mandate or rule, is purely advisory, and has no legal significance. We discussed this matter at pages 12-13 of our NPR decision. We declined to include rules concerning insurer liability, and we again decline to do so. As we previously stated, there is nothing in the statute or the legislative history that would lead us to believe that we should promulgate regulations covering an information exchange system. There is likewise nothing to suggest that we should promulgate regulations here concerning insurers' liability.

London Insurance and Reinsurance Market Association requests the Commission to find that insurance coverage by a surplus lines insurer listed on the Non-Admitted Insurers' Information Office "white list" constitutes appropriate evidence of financial responsibility for motor carriers operating in any State. We fully examined this matter, which is not at issue in this proceeding, in Revision of Regulations, supra. We determined there that alien insurance companies may not file certificates of insurance with the Commission. We reiterate that, if a company wants to act as an insurer or

surety for a regulated motor carrier, it must become fully admitted in a State of the United States, and perhaps enter one or more other States as an excess/surplus underwriter. See 49 C.F.R. §1043.8.

Exempt and Private Carriers. We previously addressed the matter of whether the statute does, and our regulations should, cover private carriers and carriers conducting exempt operations. At page 14 of our NPR decision, we noted that " § 11506, by its own terms, clearly concerns only carriers providing transportation subject to this Commission's regulatory jurisdiction." We added that "the law neither authorizes nor precludes registration programs covering unregulated carriers." The OOIDA requests us to reconsider our position and to make the regulations applicable to exempt and private carriers. It says that many States place on exempt carriers requirements identical to those they place on regulated carriers. Michigan supports the inclusion of exempt carriers in the program. The alternative, it argues, is a dual system of registration. Louisiana contends that the registration receipts should designate a carrier as regulated or exempt. In its view, even an exempt carrier should have a receipt designating its status; otherwise States will have difficulty discerning which carriers are regulated and which are not. Iowa, on the other hand, argues that the rules should make it clear that a Commission-regulated carrier does not need to register in individual States to haul exempt commodities if it already is registered to haul regulated commodities. DOT requests that the Commission declare that the final rules do not extend to private and exempt interstate carriers. It emphasizes that ISTEA is intended to reduce burdens imposed by the bingo program and that the bingo program never applied to private or exempt carriers.

We reiterate our comments in this matter. By definition, we cannot adopt regulations governing the activities of entities that are not subject to our regulatory jurisdiction. DOT may

be concerned with our statement that, "whether the States, in fact, impose registration fees on private or exempt carriers is an issue beyond the purview of this proceeding." Clearly, States cannot register private or exempt carriers under the ISTEA or under the rules we are adopting here, as the law and rules apply only to regulated interstate carriers.

Forms. In our decision and NPR, we requested parties to submit suggested forms for annual and supplemental registration applications and for receipts. The NCSTS and a single motor carrier submitted suggested forms. We will adopt the form proposed by the NCSTS, with minor modifications. (See Attachment to Appendix B.) Notably, the NCSTS's proposed registration form fails to include any provision relative to the filing of a copy of proof of public liability security submitted to and accepted by the Commission. The matter is at the heart of the registration plan, and an appropriate provision must be included in the registration form. We note that the NCSTS's proposed registration form contains a listing of the States it apparently believes are eligible to participate in the program. As the Commission has no verification that these States are, in fact, the States that are eligible to participate, we did not include this list on the form.

Commission Role. The ATA asserts that Congress delegated to the Commission the responsibility for regulating the new program and that, therefore, the rules should establish a procedure the Commission will follow to assure that States are in compliance. Travelers believes that the Commission has the duty to notify every interstate carrier of the new regulations and to explain the regulations to them. Several commentors among the States believe that the Commission should publish information regarding State fees and/or carrier registration requirements.

We discussed our role at page 16 of our NPR decision. We have been charged with the task of adopting regulations to

establish a base State insurance registration program. The registration system that the amended law contemplates is intended to function without Commission supervision. Nevertheless, we emphasize as we did before, that we will remain available to assist in developing the program. We will entertain petitions and amend the regulations when and as necessary to improve the single-State registration program. However, we do not contemplate establishing a procedure to monitor State compliance with the program. Should compliance problems develop, aggrieved persons can seek redress through the courts or by petition with the Commission, as may be appropriate.

ENVIRONMENTAL AND ENERGY CONSIDERATIONS

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

REGULATORY FLEXIBILITY CERTIFICATION

Pursuant to 5 U.S.C. § 605(b), we conclude that our action in this proceeding will not have a significant economic impact on a substantial number of small entities. The purpose of our action is to reduce a regulatory burden. The economic impact on small entities, if any, will be to reduce administrative costs and is not likely to be significant within the meaning of the Regulatory Flexibility Act.

INDEX OF TERMS

49 C.F.R. Part 1023 Insurance, Motor carriers, Surety bonds.
49 C.F.R. Part 1162 Administrative practice and procedure, Motor Carriers.

COMMISSIONER PHILLIPS, commenting:

By our decision today, we are adopting final rules implementing the single State registration system mandated by Congress in the Intermodal Surface Transportation

Efficiency Act of 1991 (Public Law No. 102-240) (ISTEA). Since instituting our rulemaking proceeding in May 1992 to formulate regulations in compliance with ISTEA, we have been diligent in our implementation of Congress' mandate to replaced the old "bingo stamp" program with a simplified motor carrier registration system that will be less burdensome to the motor carrier industry while maintaining State revenues from the program. I believe we have been successful in our endeavor, and have resolved the numerous issues raised during this proceeding in a manner consistent with the direction we received from Congress in ISTEA.

Throughout the proceeding, one issue that was particularly controversial was whether the States or the carriers would be responsible for making copies of the registration receipt. I am sympathetic to the States' concerns about the need to ensure compliance by carriers with the new system, and I understand their desire to facilitate their enforcement efforts. Nevertheless, in reviewing the limited legislative history on the "bingo stamp" provisions in ISTEA, Congress did not appear to express any particular concern about the need to assist State enforcement efforts. To the contrary, the Conference Report states that the new system is to be instituted by the Commission "in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible." Further the statutory language references "a receipt" to be given to the carrier by the base State, with no mention being made in either the statute or the report as to the question of who is responsible for making the copies of the receipt. Given this background, any potential benefit that might be derived from requiring that the States furnish all official copies of registration receipts to carriers, in my view, is outweighed by Congress' direction that we eliminate as many compliance burdens as possible. I would note, however, that the approach we have adopted in our final rule today will be of some assistance to State enforcement efforts in that the receipt issued by the base State must

identify the carrier and specify the States for which fees have been paid. While not as all-encompassing as the alternative preferred by the States, I believe our approach strikes a reasonable balance and is consistent with the guidance we have received from Congress in this area.

CHAIRMAN McDONALD, dissenting in part and commenting:

I disagree with the majority's conclusion on the issue of whether States or motor carriers should be responsible for producing copies of the registration fee receipts. I would have preferred that the States provide to each carrier the appropriate number of copies of the non-vehicle-specific receipt.

Nonetheless, I am committed to the successful implementation of the Single State Insurance Registration program. I stand ready to assist the participants in the future, and I trust the Commission will seriously entertain petitions if problems develop either in the program's start-up period or as it evolves in subsequent years.

VICE CHAIRMAN SIMMONS, dissenting in part:

I strongly disagree with the majority's rationale on the issue of whether the States or motor carriers should be responsible for producing official copies of the registration fee receipts. I would have required that only registration States issue all necessary receipts.

More than twenty States have filed comments unanimously supporting the proposal that only registration States issue all the receipts carriers need. They are rightfully concerned that allowing carriers to make copies increases the chance for fraud and abuse of the process. The insurance industry shares the States' concerns. After examining these comments, the Commission's own staff has reversed its previous position, and now concludes that the States' fears for abuse have merit.

Staff now recommends that only the States issue all official copies in order to reduce the chances for misconduct. The majority, I feel, has misconstrued Congressional intent on this issue.

I would have deferred to the experts in this matter, the State regulatory and enforcement agencies. As a result of our action, it is the States that will have to expend limited resources to audit and ferret out those individual carriers who do engage in fraud and abuse of the process. I believe that it is the height of arrogance for this Commission to impose an unwanted rule and leave the burden of enforcement on States.

COMMISSIONER PHILBIN, joined by COMMISSIONER WALDEN, dissenting in part:

I agree with the majority decision to adopt a test denominated as the "principal place of business" for the selection of a base registration state, but I disagree with the majority decision to define that term as the "*** single location that serves as a motor carriers' headquarters ***." This definition is a new invention which totally ignores the ambiguity inherent in the term "headquarters." Without explanation the majority not only rejects a more understandable and more legally settled definition such as that for the "base jurisdiction" of the International Registration Plan (IRP), but totally ignores the problems created by the term "principal place of business" which even a cursory knowledge of the litigation created by this term in the Federal courts would provide. I agree with Commissioner Walden's remarks delineating the advantages of the IRP definition, whether titled "principal place of business" or "base jurisdiction" or anything else the majority desires, since the devils reside in the definition, not in the title. Requiring a motor carrier to register in the state where it maintains its "principal place of business," if that state is a participating state, a fortiori presumes that the motor carrier possesses an identifiable "headquarters" in a "single location." Federal

legal precedents inform us that modern business practices do not lend themselves to such simplistic presumptions, since the determination of the principal place of business "*** is in each case a question of fact and the court must take into account such factors as the character of the corporation, its purposes, the kind of business in which it is engaged and the situs of its operations." *American Foundation, Inc. v. Mountain Lake Corporation*, 454 F.2d 200, 201 (5th Circ.1972).

Is the "headquarters" to be construed as the "home office"? If so, the Federal courts have devised two "home office" definitions: (1) the executive offices at which general policy decisions are made or (2) the place where day-to-day control of the business is exercised. Id.

Another view rejects the "home office" tests to determine the situs of the "principal place of business" and holds that the situs is where the corporation carries on the bulk of its activity even though the "home office" or headquarters in either of the senses described above may be elsewhere. Id. Federal courts have used varied other tests to determine the situs of the principal place of business. *Industrial Tectonics, Inc. v. Aero Alloy, et al.*, 912 F.2d 1090,1092 (9th Cir.1990). One is the "nerve center test" which defines a corporation's principal place of business as the location where its executive and administrative functions are performed. *Id.* A second line of cases utilizes the "place of operations test" to locate the principal place of business in the state which contains a "substantial predominance of corporate operations" [citation omitted] Id. at 93. Since each determination is a question of fact, judicial interpretations can become even more convoluted. *Continental Coal Corp., et al. v. Roszelle Bros., et al.*, 242 F. 243, 246 (6th Cir.1917). One series of cases has held that where a corporation conducts substantially all of its operations in one state and its headquarters is located in another state, the state of operations is the principal place of

business. *Industrial Tectonics*, supra at 1092. Another series of cases holds that where a corporation conducts business in many states, and does not conduct a predominance of its business in any single state, the state where the corporate headquarters is located is the principal place of business creating the necessity of determining which of the two "home office" tests apply. *Id.* See also *The American Foundation*, supra at 201; *Riggs v. Island Creek Coal Company*, 542 F.2d 339 (6th Cir.1976). All of this uncertainty can be avoided by adopting the settled IRP definition. The test here adopted by the majority provides innumerable opportunities for carriers, states and other entities with legal standing to frivolously test the Commission's new definition when they perceive it to be in their best interests.

The IRP definition is not only much more flexible but is easier to understand and apply. A carrier would be required to select a state (1) in which it has an established place of business, (2) where mileage is accrued by the carrier, and (3) where its operational records can be made available. The fact that no particular state is mandated, and that a carrier can select from a number of "correct" states, eliminates the certain controversy that will ensue from attempts to interpret the majority's definition. And, if in fact there is an unexpected or unwanted disadvantage to using the IRP definition, then, as Commissioner Walden suggests, the Commission can invite those aggrieved to petition for a modification of these rules.

These rules are in furtherance of Federal law, we should look to Federal case law to define terms such as "principal place of business" and should not reinvent a wheel which almost certainly will not roll smoothly. Federal case law makes clear that uncertainty will result from the use of this term unless it is defined similarly to the IRP's "base jurisdiction." The Commission should heed the guidance given by the Federal Courts on this issue and not traipse off on another frolic of its own.

COMMISSIONER WALDEN, dissenting in part:

I disagree with the majoritys' decision with respect to a carrier's selection of a registration State. Section 1023.3(a), as finally adopted, requires a carrier to select the State in which it has its "principal place of business" unless that State is not a participating State, in which case the carrier must select the State in which it will operate the largest number of vehicles over the next year. The Commission adopts this provision instead of the "base jurisdiction" definition included in the International Registration Plan (IRP), which was recommended by ATA.

Under the IRP definition, a carrier would be allowed to select a State in which it has an established place of business, where mileage is accrued by the carrier, and where official records can be made available. The IRP once defined the base jurisdiction as the carrier's principal place of business, but ATA states this definition was changed after experience showed it to be inflexible. The industry has much experience under the IRP provision; it is easy to understand and follow; and it would avoid fine legal disputes over what constitutes a carrier's "principal place of business" and over the accuracy of a carrier's projection of the State in which the largest number of vehicles would operate in the future. The majority decision asserts that "principal place of business is a certain location," but this is not always so. The Commission's definition of the "principal place of business" in §1023.1(d) may contemplate only one headquarters per carrier, but the concept of "headquarters" is not fixed and becoming even less in today's world of business.

So why does the Commission rejects the IRP definition and risk these problems? Because it fears that "free choice" will cause some States to bear "disproportionate burdens." Because the single-state system is not yet operational, of course, this fear is unsupported. In fact, neither the IRP definition nor the final rule provision eliminates the risk of

base state shopping. Without conceding that base state shopping must be discouraged, I do not believe the Commission should concern itself with hypothetical concerns that may well prove baseless. I would respond to this concern in the same way the Commission responds in this decision to a similar fear of "disproportionate burdens" expressed by the State of North Dakota (Canadian carriers may select northern border states):

We advise North Dakota and similarly situated States that should such a problem occur, they can petition for modification of the rules, and we can address the problem based on a record fully developed with regard to the issue. Because I would adopt the IRP base jurisdiction definition for selection of registration State, I dissent from that portion of the Commission's decision.

It is ordered:

1. The regulations at 49 C.F.R. Parts 1023 and 1162, governing registration by interstate motor carriers with States, are amended in the manner set forth in Appendix B to the decision.

2. The forms described in the superseded rules are canceled effective 12:01 a.m. January 1, 1994.

3. Notice of this decision will be published in the Federal Register and the ICC Register on May 18, 1993.

4. This decision will take effect on May 18, 1993.

5. This decision is issued under the authority of 49 U.S.C. § § 10321 and 11506 and 5 U.S.C. §553.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin and Walden. Commissioner Phillips commented with a separate expression. Chairman McDonald dissented in part and commented with a separate expression. Vice Chairman

Simmons dissented in part with a separate expression. Commissioner Philbin, joined by Commissioner Walden, dissented in part with a separate expression. Commissioner Walden dissented in part with a separate expression.

APPENDIX A

LIST OF COMMENTORS

Motor Carrier Interests
American Bus Association
American Movers Conference and Household Goods Carriers' Bureau
American Trucking Associations
Atlas Van Lines
Gray Motor Line, Inc.
Interstate Truckload Carriers Conference
North American Van Lines, Inc.
Owner-Operator Independent Drivers Association, Inc.
Regular Common Carrier Conference
Yellow Freight System, Inc.

State Interests
National Association of Regulatory Utility Commissioners
National Conference of State Transportation Specialists
Alabama Public Service Commission
Arkansas State Highway Commission
Public Utilities Commission of the State of California
Colorado Public Utilities Commission
Georgia Public Service Commission
Idaho Public Utilities Commission
Illinois Commerce Commission
Iowa Department of Transportation
Kansas Corporation Commission
Kentucky Transportation Cabinet
Louisiana Public Service Commission
Maine Secretary of State, Bureau of Motor Vehicles
Michigan Public Service Commission
Minnesota Department of Transportation
Missouri Division of Transportation
Nebraska Public Service Commission

New Mexico State Corporation Commission
New York Department of Transportation
North Dakota Department of Transportation
Public Utilities Commission of Ohio
Oklahoma Corporation Commission
Oregon Public Utility Commission
Public Service Commission of South Carolina
Tennessee Public Service Commission
Railroad Commission of Texas
Virginia State Corporation Commission
Washington Utilities and Transportation Commission
Wisconsin Department of Transportation

Insurer Interests
American Insurance Association
Erie Insurance Exchange
Hawkeye-Security Insurance Company and United Security Insurance Company
London Insurance and Reinsurance Market Association and certain member companies of the Institute of London Underwriters
National Association of Independent Insurers
Northland Insurance Companies
The Travelers Insurance Company

Shipper Interests
National-American Wholesale Grocers' Association and International Foodservice Distributors Association
National Private Truck Council

Federal Government
United States Department of Transportation

Other Commentors
Joy B. Fitzgerald
Halsey Traffic Services

APPENDIX B

Final Amendments to Title 49, Chapter X of the Code of Federal Regulations

1. Part 1023 is revised to read as follows:

PART 1023—STANDARDS FOR REGISTRATION WITH STATES

Sec.
1023.1 Definitions.
1023.2 Participation by States.
1023.3 Selection of registration State.
1023.4 Requirements for registration.
1023.5 Registration receipts.
1023.6 Registration State accounting.
1023.7 Violations unlawful; criminal penalties and civil sanctions.

Appendix A to Part 1023—UNIFORM APPLICATION FOR SINGLE STATE REGISTRATION FOR MOTOR CARRIERS OPERATING UNDER AUTHORITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION.

AUTHORITY: 49 U.S.C. § § 10321 and 11506; 5 U.S.C. § 553.

§ 1023.1 Definitions.

(a) The Commission. The Interstate Commerce Commission.

(b) Motor carrier and carrier. A person authorized to engage in the transportation of passengers or property, as a common or contract carrier, in interstate or foreign commerce, under the provisions of 49 U.S.C. § § 10922, 10923, or 10928.

(c) Motor vehicle. A self-propelled or motor driven vehicle operated by a motor carrier in interstate or foreign commerce under authority issued by the Commission.

(d) Principal place of business. A single location that serves as a motor carrier's headquarters and where it maintains or can make available its operational records.

(e) State. A State of the United States or the District of Columbia.

§ 1023.2 Participation by States.

(a) A State is eligible to participate as a registration State and to receive fee revenue only if, as of January 1, 1991, it charged or collected a fee for a vehicle identification stamp or a number pursuant to the provisions of the predecessor to this Part.

(b) An eligible State that intends either to commence or to cease participating in the registration program must publish notice of its intention by the 1st day of July of the year preceding the registration year in which it will commence or cease participating.

§1023.3 Selection of registration State.

(a) Each motor carrier required to register and pay filing fees must select a single participating State as its registration State. The carrier must select the State in which it maintains its principal place of business, if such State is a participating State. A carrier that maintains its principal place of business outside of a participating State must select the State in which it will operate the largest number of motor vehicles during the next registration year. In the event a carrier will operate the same largest number of vehicles in more than one State, it must select one of those States.

(b) A carrier may not change its registration State unless it changes its principal place of business or its registration State ceases participating in the program, in which case the carrier must select a registration State for the next registration year under the standards of paragraph (a) of this section.

(c) A carrier must give notice of its selection to the State commission of its selected registration State, and, the State commission of its prior registration State, within 30 days after it has made its selection. If a carrier changes its principal place of business during the annual registration period specified in s 4(b)(2) of this part, the carrier may continue to use its prior registration State, if any, for the next registration year.

(d) A carrier must give notice of its selection to its insurer or insurers as soon as practicable after it has made its selection.

§ 1023.4 Requirements for registration.

(a) Except as provided in paragraph (c)(1) of this section with regard to a carrier operating under temporary authority, only a motor carrier holding a certificate or permit issued by the Commission under 49 U.S.C. §10922 or 10923 shall be required to register under these standards.

(b) A motor carrier operating in interstate or foreign commerce in one or more participating States under a certificate or permit issued by the Commission shall be required to register annually with a single registration State, and such registration shall be deemed to satisfy the registration requirements of all participating States.

(1) The registration year will be the calendar year.

(2) A carrier must file its annual registration application between the 1st day of August and the 30th day of

November of the year preceding the registration year. A carrier that intends to commence operating during the current registration year may register at any time, but it must do so before it commences operating.

(3) The registration application must be in the form appended to this Part and must contain the information and be accompanied by the fees specified in subsection (c) below. There will be no prorating of fees to account for partial year operations.

(4) A carrier that has changed its registration State since its last filing must identify the registration State with which it previously filed.

(c) A motor carrier must file, or cause to be filed, the following with its registration State:

(1) Copies of its certificates and/or permits. A carrier must supplement its filing by submitting copies of any new operating authorities as they are issued. Once a carrier has submitted copies of its authorities, it may thereafter satisfy the filing requirement by certifying that the copies are on file. A carrier may, with the permission of its registration State, submit a summary of its operating authorities in lieu of copies. A carrier granted emergency temporary authority or temporary authority having a duration of 120 days or less is not required to file evidence of such authority, but it must otherwise comply with the requirements of this section;

(2) A copy of its proof of public liability security submitted to and accepted by the Commission under 49 C.F.R. Part 1043 or a copy of an order of the Commission approving a public liability self-insurance application or other public liability security or agreement under the provisions of that Part. A carrier must supplement its filings as necessary to ensure that current information is on file. Once a carrier has submitted, or

caused to be submitted, a copy of its proof or order of the Commission, it may thereafter satisfy the filing requirement by certifying that it has done so and that its security, self-insurance, or agreement remains in effect;

(3) A copy of its designation of an agent or agents for service of process submitted to and accepted by the Commission under 49 C.F.R. Part 1044. A carrier must supplement its filings as necessary to ensure that current information is on file. Once a carrier has submitted a copy of its designation, it may thereafter satisfy the filing requirement by certifying that its designation is on file; and

(4) A fee for the filing of proof of insurance. In support of such fee, the carrier must submit the following information:

(i) The number of motor vehicles it intends to operate in each participating State during the next registration year;

(ii) The per vehicle fee each pertinent participating State charges, which fee must equal the fee, not to exceed $10, that such State collected or charged as of November 15, 1991;

(iii) The total fee due each participating State; and

(iv) The total of all fees specified in paragraph (c)(4)(iii) of this section.

(d) Consistent with its obligations under paragraph (c)(2) of this section, a carrier must cause to be timely filed with its registration State copies of any notices of cancellation or of any replacement certificates of insurance, surety bonds, or other security filed with the Commission under 49 CFR Part 1043.

(e) A carrier must make such supplemental filings at any time during the registration year as may be necessary to

specify additional vehicles and/or States of operation and to pay additional fees.

(f) A motor carrier must submit to its insurer or insurers a copy of the supporting information, including any supplemental information, filed with its registration State under paragraphs (c)(4) and (e) of this section.

(g) The charging or collection of any fee that is not in accordance with the fee system established above is deemed a burden on interstate commerce. This includes fees for the registration or filing of evidence of insurance whether assessed directly upon the carrier or indirectly upon the insurance provider or other party who seeks reimbursement from the carrier.

(h) To the extent any State registration requirement imposes obligations in excess of those specified in this Part, the requirement is an unreasonable burden on transportation within the Commission's jurisdiction under 49 U.S.C. §10521(a).

§1023.5 Registration receipts.

(a) On compliance by a motor carrier with the annual or supplemental registration requirements of §1023.4 of this Part, the registration State must issue the carrier a receipt reflecting that the carrier has filed the required proof of insurance and paid fees in accordance with the requirements of that section.

(1) The receipt must contain only information identifying the carrier and specifying the States for which fees were paid. Supplemental receipts need contain only information relating to their underlying supplemental registrations.

(b) Receipts issued pursuant to a filing made during the annual registration period specified in §1023.4(b)(2) of this

part must be issued within 30 days. All other receipts must be issued by the 30th day following the date of filing of a fully acceptable supplemental registration application. All receipts shall expire at midnight on the 31st day of December of the registration year for which they were issued.

(c) A carrier is permitted to operate its motor vehicles only in those participating States with respect to which it has paid appropriate fees.

(d) A motor carrier may make copies of receipts to the extent necessary to comply with the provisions of paragraph (e) below. However, it may not alter a receipt or a copy of a receipt.

(e) A motor carrier must maintain in each of its motor vehicles a copy(ies) of its receipt(s), indicating that it has filed the required proof of insurance and paid the required fees.

(f) The driver of a motor vehicle must present a copy(ies) of a receipt(s) for inspection by any authorized government personnel on reasonable demand.

(g) No registration State shall require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by a motor carrier.

§1023.6 Registration State accounting.

(a) A participating State must, on or before the last day of each month, allocate and remit to each other participating State the appropriate portion of the fee revenue registrants submitted during the preceding month. Each remittance must be accompanied by a supporting statement identifying registrants and specifying the number of motor vehicles for which each registrant submitted fees.

A participating State must submit a report of "no activity" to any other participating State for which it collected no fees during any month.

(b) A participating State must maintain records of fee revenue received from and remitted to each other participating State. Such records must specify the fees received from and remitted to each participating State with respect to each motor carrier registrant. A participating State must retain such records for a minimum of 3 years.

(c) A participating State must keep records pertaining to each of the motor carriers for which it acts as a registration State. The records must, at a minimum, include copies of annual and supplemental registration applications containing the information required by §1023.4(c). A registration State must retain all such records for a minimum of 3 years.

§1023.7 Violations unlawful; criminal penalties and civil sanctions.

Any violation of the provisions of these standards is unlawful. Nothing in these standards shall be construed to prevent a State from imposing criminal penalties or civil sanctions upon any person or organization violating any provision of them.

APPENDIX A TO PART 1023

UNIFORM APPLICATION FOR SINGLE STATE REGISTRATION FOR MOTOR CARRIERS OPERATING UNDER AUTHORITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION

MOTOR CARRIER IDENTIFICATION NUMBERS:

ICC MC No.(s.)

US DOT No.

APPLICANT (Identical to name on ICC order):

NAME:

D/B/A

PRINCIPAL PLACE OF BUSINESS ADDRESS: [1]

Street

City_____ State _____ Zip_____

MAILING ADDRESS IF DIFFERENT FROM BUSINESS ADDRESS ABOVE:

Street

City_____ State _____ Zip_____

TYPE OF REGISTRATION:

[] New Carrier Registration—The motor carrier has not previously registered.

[1] A principal place of business is a single location that serves as a motor carrier's headquarters and where it maintains or can make available its operational records.

[ ] Annual Registration—The motor carrier is renewing its annual registration.

[ ] Supplemental Registration—The motor carrier is adding additional vehicles or States of travel after its annual registration.

[ ] New Registration State Selection—The motor carrier has changed its principal place of business or its prior registration State has left the registration program. The prior registration State was_____.

[ ] Additional States not registered in prior years. List _____

TYPE OF MOTOR CARRIER: (Check one)

[ ] Individual [ ] Partnership [ ] Corporation

If corporation, give State in which incorporated: _____

List names of partners or officers:

Name:_____ Title:_____
Name:_____ Title:_____
Name:_____ Title:_____

TYPE OF ICC REGISTERED AUTHORITY:

Permanent Certificate or Permit [ ] Temporary Authority (TA) [ ]

Emergency Temporary Authority (ETA) [ ]

ICC CERTIFICATE(S) OR PERMIT(S):

[ ] ICC Authority Order(s) attached for initial registration.

[ ] ICC Authority Order(s) attached for additional grants received.

[ ] No change from prior year registration.

PROOF OF PUBLIC LIABILITY SECURITY:

[ ] The applicant is filing, or causing to be filed, a copy of its proof of public liability security submitted to and accepted by the ICC under 49 C.F.R. Part 1043.

[ ] The applicant has filed, or caused to be filed, a copy of its proof of public liability security submitted to and accepted by the ICC under 49 C.F.R. Part 1043, and the security remains in effect.

ICC APPROVED SELF-INSURANCE OR OTHER SECURITIES:

[ ] ICC Insurance order attached for new carrier registration.

(Check one when completing for annual registration.)

[ ] The ICC Order approving the self-insurance plan or other security is still in full force and effect, and the carrier is in full compliance with all conditions imposed by the ICC Order.

[ ] The motor carrier is no longer approved under a self-insurance plan or other security, and the motor carrier will file, or cause to be filed, a copy of proof of public liability security with this application in the registration State.

HAZARDOUS MATERIALS: (Check one)

[ ] The applicant will not haul hazardous materials in any quantity.

[ ] The applicant will haul hazardous materials that require the following limits in accordance with Title 49 C.F.R. §1043.2:

(Check one)

[ ] Public Liability and Property Damage Insurance of $1 million.

[ ] Public Liability and Property Damage Insurance of $5 million.

PROCESS AGENTS:

[ ] ICC Form No. BOC-3 or blanket designation attached for new registration.

[ ] ICC Form No. BOC-3 or blanket designation attached reflecting changes of designation of process agents.

[ ] No change from prior year registration.

CERTIFICATION:

I, the undersigned, under penalty for false statement, certify that the above information is true and correct and that I am authorized to execute and file this document on behalf of the applicant. (Penalty provisions subject to the laws of the registration State.)

Name (Printed)

_____

Signature _____ Title

Telephone Number _____ Date

PART 1162—TEMPORARY AUTHORITY (TA) AND EMERGENCY TEMPORARY AUTHORITY (ETA) PROCEDURES UNDER 49 U.S.C. §10928

2. The authority citation for Part 1162 continues to read as follows:

Authority: 49 U.S.C. §§10321; 10928; 5 U.S.C. §559. §§1162.7 and 1162.8. [Removed]

3. Sections 1162.7 and 1162.8 are removed.

APPENDIX F

H.R. Conf. Rep. No. 404, 102nd Cong., 1ST Sess. 1991
1991 USCC&AN 1679
P.L. 102-240

INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991

HOUSE CONFERENCE REPORT NO. 102-404
[Excerpt]
SINGLE STATE REGISTRATION

CONFERENCE SUBSTITUTE

Section 405 repeals, effective January 1, 1994, the "bingo stamp" program authorized by Congress in 1965 through enactment of P.L. 89-170. The bingo stamp program allowed states to require interstate carriers to register their interstate operating authority with the state and charge a fee for doing so. The interstate carrier then received identification or "bingo" stamps from the state. Currently, 39 states require interstate carriers to carry such a stamp in the cab of each commercial motor vehicle operating within its borders.

The bingo stamp program authorized by P.L. 89-170 has been characterized as inefficient and has been an administrative burden on the trucking industry and the states. The trucking industry estimates that the program costs interstate carriers up to $250 million per year. Meanwhile, the 39 participating states collect only about $50 million under the program. The repeal of the bingo stamp program under Section 405 is intended to benefit the interstate carriers by eliminating unnecessary compliance burdens. It is the hope of the Conferees that, ultimately, consumers will also benefit from the cost savings associated with the elimination of the bingo program.

In order to preserve revenues for the states which had participated in the bingo program, Section 405 establishes a

new annual fee system enabling such states to continue to collect funds from interstate motor carriers. The fee is based upon the carrier's filing of proof of required liability insurance. Fee revenues under this system must be collected through a streamlined administrative process established by Section 406 known as the "single state" or "base state" registration system. Under the single state registration system, a carrier will pay its annual fees to a single state (its base state) and that state will distribute the collections to other participating states in which the carrier's vehicles operate. This system is to be instituted by the Interstate Commerce Commission, in consultation with the participating states and the trucking industry, in such a manner as to eliminate as much of the paperwork and other compliance burdens as possible. Section 405 specifies that the only evidence of payment or other identification a vehicle must carry under this system is a copy of the receipt given the carrier by the base state.

States which did not collect bingo stamp fees under the former program will not be able to collect the new fees authorized by Section 405. Additionally, states must participate in the base state program in order to collect the fees authorized by Section 405. States are expressly prohibited from charging a fee for the registration of a carrier's interstate operating authority or for any other filings which may be required under Section 405.

The new fee system is to be based upon the number of vehicles which a carrier operates in a state and the number of states in which that carrier operates. States will not be allowed to charge a greater fee under Section 405 than the fee they charged under the former program as of November 15, 1991. The fee cannot exceed $10 per vehicle under any circumstances.

The Conference version of Section 405 does not authorize any funds to be distributed to the states from the Highway Trust Fund.

APPENDIX G

49 U.S.C. 11506. Registration of motor carriers by a State

(a) DEFINITIONS.—In this section, the terms "standards" and "amendments to standards" mean the specification of forms and procedures required by regulations of the Interstate Commerce Commission to prove the lawfulness of transportation by motor carrier referred to in section 10521(a)(1) and (2) of this title.

(b) GENERAL RULE.—The requirement of a State that a motor carrier, providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and providing transportation in that State, register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

(c) SINGLE STATE REGISTRATION SYSTEM.—

(1) IN GENERAL.—Not later than 18 months after the date of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991, the Commission shall prescribe amendments to the standards existing as of such date of enactment. Such amendments shall implement a system under which–

(A) a motor carrier is required to register annually with only one State;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) SPECIFIC REQUIREMENTS.—

(A) EVIDENCE OF CERTIFICATE; PROOF OF INSURANCE; PAYMENT OF FEES.—Under the amended standards implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle

(i) to file and maintain evidence of such certificate or permit;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) RECEIPTS; FEE SYSTEM.—Such amended standards—

(i) shall require that the registration State issue a receipt, in a form prescribed under the amended standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining a certificate or permit under subparagraph (A)(i) of this paragraph.

(C) PROHIBITED FEES.—The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

(D) LIMITATION ON PARTICIPATION BY STATES.—Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection.

(3) EFFECTIVE DATE OF AMEND-MENTS.—Amendments prescribed under this subsection shall take effect by January 1, 1994.

(d) INTERPRETATION AUTHORITY OF COMMIS-SION.—This section does not affect the authority of the Commission to interpret its regulations and certificates and permits issued under section 10922 or 10923 of this title.

APPENDIX H

Mich. Comp. Laws § 478.7 (2001)

Motor carrier engaged in interstate or foreign transportation of property for compensation; registration and vehicle fees; filing record of authority; approval of application for registration of exempt operations; annual fee; reciprocal agreement; disposition of fees.

(1) A motor carrier shall not engage in the interstate or foreign transportation of property for compensation without first having registered with the commission and paid the required registration and vehicle fees.

(2) A motor carrier operating in this state under authority granted by the interstate commerce commission pursuant to section 10922 of subchapter II of chapter 109 of subtitle IV of title 49 of the United States code, 49 U.S.C. 10922, shall file and maintain a record of that authority with the commission. A motor carrier shall not operate within this state without first complying with this subsection.

(3) A motor carrier shall not engage in the interstate transportation of property within this state pursuant to exemptions from economic regulation permitted under the interstate commerce act, under subtitle IV of title 49 of the United States code, 49 U.S.C. 10101 to 11917, without the approval by the commission of an application for the registration of the exempt operations.

(4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

(5) Of the fees collected pursuant to this section, not less than 90% of those fees collected in excess of $1,400,000.00 annually shall be deposited in the truck safety fund established in section 25 of Act No. 51 of the Public Acts of 1951, being section 247.675 of the Michigan Compiled Laws.

FILED

SEP 13 2001

OFFICE OF THE CLERK

No. 01-270

In the Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

v

STATE OF MICHIGAN, *ET AL*,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR THE STATE OF MICHIGAN, *ET AL* IN OPPOSITION

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QUESTION PRESENTED

Under the Single State Registration System, 49 USC 14504(c)(2)(B)(iv)(III), a State is authorized to charge a fee "that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." In September, 1991, the Respondents State of Michigan, *et al* mailed renewal registration forms to the Petitioner charging $10 per vehicle for the 1992 registration year. In October, 1991, the Petitioner paid those registration fees. The question presented is whether such fees were "collected or charged as of November 15, 1991" within the meaning of 49 USC 14504(c)(2)(B)(iv)(III).

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STATEMENT OF THE CASE

The Petitioner asserts that the Court should grant review because the Michigan Supreme Court decision below is in conflict with a decision of the D.C. Circuit. However, this case, which was litigated on facts not before the D.C. Circuit, does not warrant this Court's review. Indeed, the Petition provides scant information about how and why the controversy arose. Moreover, the Petition creates the impression that critical facts below were undisputed, particularly as to the amount of the fee that was charged and collected as of November 15, 1991. The Respondents, however, have consistently maintained throughout this litigation that the challenged $10 per vehicle fee was lawful precisely because it was charged and collected from Petitioner prior to the statutory cut-off date of November 15, 1991. Moreover, the Respondents did not ignore or cancel any reciprocity agreements. While the Michigan Supreme Court did not agree with the D.C. Circuit, it clearly reached the proper result in this case for reasons other than stated in its opinion. Finally, the Petitioner's parade of horribles is baseless as it is unlikely that the Michigan Supreme Court's decision will result in a stampede of states canceling long-standing reciprocity agreements in an effort to increase revenues. In short, this case is a poor vehicle for resolving the conflict alleged by the Petitioner. After briefly outlining the background legal framework applicable to this case, the Respondents set forth critical facts not contained in the Petition.

1. Congress enacted the Motor Carrier Act of 1935, 49 USC 301 *et seq*, to provide for limited state regulation of interstate commercial transportation. Through various amendments, States were authorized to register interstate motor carriers, subject to supervision of the Interstate Commerce Commission (ICC). Under this registration program, which began in 1965, States choosing to participate were allowed to charge up to $10 for each vehicle registered. As proof of registration each State issued a stamp for each vehicle and

these stamps were placed in the appropriate state spot on "bingo cards" carried in the cab of each vehicle.[1]

2. In Michigan, although the Michigan Public Service Commission (MPSC) had reciprocity agreements with several states and provinces pertaining to fees for motor carriers in interstate commerce, it did not issue bingo card stamps to interstate, foreign and exempt interstate motor carriers until the Michigan Legislature enacted 1988 PA 347 (Act 347), an amendment to the Michigan Motor Carrier Act, 1933 PA 254, MCL 475.1 *et seq.* Act 347, which became effective January 1, 1989, authorized the MPSC to begin charging fees[2] for each vehicle of interstate motor carriers. See, MCL 478.7(4). Additionally, Act 347 permitted the MPSC to enter into reciprocity agreements with other states that did not charge vehicles licensed in this state. Thus, beginning in the fall of 1989, the MPSC began issuing bingo card stamps for the registration year beginning 1990.

3. As of 1991, 38 States, including Michigan, participated in this registration system. Some, but not all States entered into reciprocal arrangements under which they would discount or waive the fee for carriers based in each other's state. Most States used the motor carrier's principal place of business as the basis for determining reciprocity. Michigan, however, used the State in which the vehicle was base-plated, i.e. where it was registered or license plated, as the basis for determining reciprocity. Under this approach, for registration years 1990 and 1991, Michigan did not charge a fee for

[1] Motor carrier vehicles may carry any number of different cab cards in the cab of each vehicle. Examples include cab cards for the International Registration Plan (IRP), the International Fuel Tax Agreement (IFTA), the "bingo stamp" card for vehicles that operate interstate, and cab cards for each state in which a vehicle may operate intrastate.

[2] As originally enacted, 1988 PA 347 provided that the MPSC was required to charge an annual fee equal to the charge levied on Michigan-licensed motor carrier vehicles in the other state. In 1989, the Michigan Legislature enacted 1989 PA 221 which amended this section by changing the annual registration fee on each vehicle to $10.00.

vehicles base-plated in a State that did not charge a fee for vehicles that were base-plated in Michigan.

4. Early in 1991 the MPSC determined that granting reciprocity using base-plating, rather than place of business, was unduly complex, inefficient to administer, and inconsistent with the registration system used by virtually all other states. See Affidavit of Thomas R. Lonergan. Respondents' Appendix (Res. App.), p. 4b. For example, vehicles operated by a single motor carrier but base-plated in several different States required several different calculations. *Id.* This significantly increased the possibility of error in reciprocity waivers. *Id.* Further, it became apparent to Michigan that it was one of a very few number of States using this system as opposed to the principal place of business as the basis for affording reciprocity.[3]

5. Contemporaneous with Michigan's determination that its method for determining reciprocity was difficult to administer and inconsistent with the approach of other States, Congress was considering legislation to streamline the state registration system. Recognizing that such legislation could include a mandatory uniform approach by participating states, the MPSC decided to terminate its use of base-plating as the method of determining reciprocity in favor of the "place of business" method of determining reciprocity to be consistent with other states. Res. App., p. 4b. Thus, early in 1991, Michigan brought its registration program in line with other state programs by adopting a revised reciprocity system based on the motor carrier's principal place of business. Rather than immediately implementing this change, the MPSC decided, for the convenience of the industry, it would implement the change in the fall of 1991 when the annual renewals occurred.

[3] Other states that had used base-plating included Oklahoma, North Carolina and Indiana. All the foregoing states participate in the Single State Registration System (SSRS) and now use principal place of business for determining reciprocity.

6. On December 18, 1991, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) was enacted into law. Pub L 102-240. 105 Stat 1914-2207. Included within ISTEA was Section 4005, "Single State Registration System" (SSRS). 105 Stat 2146-2148. 49 USC 14504(c). The SSRS created a streamlined system for the registration of a motor carrier's vehicles engaged in interstate commerce. Previously, motor carriers were required to separately register their vehicles in each state that the vehicles operated in. The SSRS implemented a single state filing concept where a motor carrier would only file in and submit payment to the state in which it was based. That single filing and payment would cover vehicle registrations and fees for all states where the motor carrier operated vehicles. The state in which the motor carrier is based then sends the registrations and fees to all other states where such vehicles are operated.

7. Congress provided that the SSRS was to take effect by January 1, 1994. 105 Stat 2148.[4] It further provided that the ICC was to prescribe standards for the SSRS. With respect to the fee system under the SSRS, Congress provided as follows at 49 USC 14504(c)(2)(B)(iv)(III):

> (B) Receipts; fee system. Such amended standards—
>
> > (iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of

[4] The effective date of the SSRS was set forth in Section 4005 of ISTEA and codified as 49 USC 11506(c)(3) and may be found at 105 Stat 2148. Subsection (c)(3) of 49 USC 11506 was not included in the subsequent recodification that occurred in 1995 when 49 USC 11506 became 49 USC 14504.

> complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.* 49 U.S.C. 14504(c)(2)(B)(iv)(III). (Emphasis added.)

8. In September 1991, two months prior to the November 15, 1991 cut-off date specified in 49 USC 14504(c)(2)(B)(iv)(III), Michigan sent out renewal interstate cab (i.e. bingo) card stamp application forms to motor carriers for the 1992 registration year. Res. App., p. 25b. On the back of the application form were instructions which stated that "[t]he cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations." Res. App., p. 28b. The amount of fees appropriate to a motor carrier's fleet was determined by reference to an accompanying chart identifying cab card stamp fees. Res. App., p. 30b.

9. No change was made to Michigan's registration fee of $10.00 per vehicle, as authorized by MCL 478.7(4). Nor was there any change to Michigan's long-standing practice of collecting renewal fees in the fall for registration in the upcoming year, as is the practice with most, if not all, other States.[5] Moreover, there was no change in which states Michigan had reciprocity with. Michigan continued to exercise reciprocity with the same states, both before and after November 15, 1991. The only change was the basis for determining reciprocity, i.e. the fee would be determined on the carrier's principal place of business rather than on the license plating of a particular vehicle. The result was that some carriers that previously qualified for reciprocal fee discounts

[5] In fact, the SSRS requires motor carriers to register in the fall preceding the registration year. The SSRS procedures manual states that registrants must file an application for registration and pay fees no earlier than August 1 and no later than November 30 of each year for the upcoming year.

upon the base-plating methodology were no longer afforded a discount while others that had not been eligible for discount under base-plating were eligible for a discount under the principal place of business methodology.

10. One of the carriers affected by this change was Yellow Freight. In the calendar years 1990 and 1991, Yellow Freight had 3,730 vehicles base-plated in Illinois and Indiana. Under the base-plating method of determining reciprocity that Michigan had in effect at that time, Yellow Freight was not charged for those bingo card stamps as those states did not charge fees for vehicles base-plated in Michigan. See Affidavit of Thomas R. Lonergan, Res. App., p. 5b. Yellow Freight, however, was charged for five vehicles that were base-plated in Oklahoma. Res. App., p. 5b. After Michigan changed its method for determining reciprocity based on a company's principal place of business, Yellow Freight paid a $10.00 per vehicle registration fee for all its vehicles, as its principal place of business was in Kansas, and Michigan had no reciprocity with the State of Kansas. Res. App., p. 26b. The application form for the 1992 calendar year was mailed to Yellow Freight in September 1991. The application form was returned on October 3, 1991 with payment in full. Res. App., p. 25b. Since September, 1991 Michigan has annually charged and Yellow Freight has annually paid a registration fee of $10.00 per vehicle for each vehicle operated in Michigan inasmuch as Yellow Freight's principal place of business remains in Kansas and Michigan has no reciprocity with that state.

REASONS FOR DENYING THE PETITION

I. THE CONFLICT ALLEGED BY THE PETITIONER IS NOT A "SQUARE" CONFLICT SINCE THE CHALLENGED FEES WOULD BE LAWFUL UNDER THE D.C. CIRCUIT'S DECISION IN *NATIONAL ASS'N OF REGULATORY UTILITY COMM'RS v ICC.*

The Petitioner claims that certiorari should be granted to rectify an open and direct conflict between the D.C. Circuit

and Michigan Supreme Court. While the Michigan Supreme Court candidly noted its disagreement with the D.C. Circuit, the Respondents believe that the result in this case would be the same regardless of how the conflict is decided. This is entirely due to facts in this case that were not before the D.C. Circuit.

In *National Ass'n of Regulatory Utility Comm'rs v ICC,* 41 F3d 721 (DC Cir, 1994), the United States Court of Appeals for the District of Columbia Circuit upheld an ICC determination that under the SSRS participating states could not disregard reciprocity agreements and could not charge more than was collected as of November 15, 1991. The National Association of State Regulatory Utility Commissioners (NARUC) had appealed the ICC decision arguing that the ICC's decision unreasonably limited the States to charges that were assessed under circumstances not covered by the statute. *Id.* 41 F3d at 729. Additionally, NARUC argued that the ICC had failed to provide an adequate explanation of its decision, considering that the ICC had originally proposed to allow the States to disregard reciprocity agreements. *Id.* The D.C. Circuit rejected NARUC's challenge finding that because "[f]ederal law merely states that a state may not charge more than was charged or collected in the past" ... "the plain language of the statute precludes petitioners' interpretation." *Id.* (emphasis in original). The D.C. Circuit then added "[i]t does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it." *Id.*

In its decision below the Michigan Supreme Court, like the D.C. Circuit, found that the plain language of the statute controlled the outcome and applied the statute as written. The Michigan Supreme Court correctly noted that the ISTEA "refers only to the fee collected and charged, and contains no reference to reciprocity agreements." Pet. App., p. 9a. It notes that 49 USC 14504(c)(2)(B)(iv)(III) directed the ICC to "establish a fee system" that "result[s] in a fee, not to exceed $10 per vehicle, that such State collected or charged as of

November 15, 1991." *Id.* The Michigan Supreme Court then concluded:

> The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the state had in place on November 15, 1991. We must look not at the fees paid by plaintiff in any given year, but at the generic fee charged or collected as of November 15, 1991. Pet. App., p. 9.

The Michigan Supreme Court held, as a matter of state law, that the fee charged and collected as of November 15, 1991 was $10. Pet. App., p. 10a. It also found that the ICC's position that States must consider fees charged or collected under reciprocity agreements when determining the fees charged and collected under 49 USC 11506(c)(2)(B)(iv) added a concept not within the express language of the statute. Pet. App., pp. 10a-11a.

What is striking is that under the facts of this case resolution of the conflict alleged is not necessary since the Respondents' actions are lawful under both the D.C. Circuit's and Michigan Supreme Court's decisions. This is because: 1) the Respondents did not disregard any reciprocity agreements; and 2) the Respondents charged and collected the challenged $10 per vehicle fee from Petitioner prior to November 15, 1991. In short, the conflict alleged by the Petitioner is not a "square one" or "on all fours" because under these facts, the Respondents' actions comply with the D.C. Circuit's decision.

Tellingly, the Petition neither fairly nor fully describes the facts in this case. At page 9, it claims that Respondents decided to ignore fees being charged under reciprocity agreements. It then, in a carefully worded sentence, claims that "it is undisputed that the fee which Michigan was charging as of November 15, 1991 for registering Illinois-plated vehicles to conduct interstate operations on that date was zero." It then

states that "[e]ffective February 1, 1992, however, Michigan changed its policy and began assessing a $10 per vehicle fee for Illinois-plated vehicles." The Petition, however, fails to disclose to the Court a number of critical facts.

First, contrary to the Petition's claim, none of the reciprocity agreements that Michigan had with other States were either ignored or canceled. The Respondents maintained and continued reciprocity with the State of Illinois both before and after the charging and collection of the challenged fees. All that changed was the method for determining reciprocity. Moreover, this change had nothing to do with increasing revenues. The effect was essentially a revenue wash since some carriers paid more while other carriers paid less. Furthermore, the changeover to using the principal place of business methodology for determining reciprocity was critical to the Respondents being able to participate in the SSRS. Res. App., p. 4b.

Second, the MPSC policy change referred to by the Petitioner occurred in 1991, not 1992. Moreover, the policy change was implemented in September, 1991 when the Respondents, consistent with past practice, began charging and collecting the $10 per vehicle fee for the upcoming calendar year.

Finally, the Petition's statement that, as of November 15, 1991, it is undisputed that the fee charged for registering Illinois-plated vehicles to conduct operations on that date was zero is both misleading and irrelevant. As the Respondents' Statement of the Case clearly demonstrates the $10 per vehicle fee being challenged in this case was both *charged to and collected from* the Petitioner prior to November 15, 1991. Although the Michigan Supreme Court noted this fact, it did not figure in its disposition of the case. The D.C. Circuit's disposition of the case before it, however, was decided on whether a State's fee was charged or collected as of November 15, 2001. Because the challenged fees in this case were actually charged and collected as of November 15, 1991, the

conflict alleged by the Petitioner is not a "square" conflict since the fees challenged by the Petitioner would be lawful under the D.C. Circuit's decision in *National Ass'n of Regulatory Utility Comm'rs v ICC, supra.*

II. THE MICHIGAN SUPREME COURT EXPRESSLY FOLLOWED THE DECISION OF THIS COURT IN *CHEVRON.*

The Petitioner contends that the Michigan Supreme Court erred in that it was required to defer to the ICC's interpretation with respect to reciprocity agreements because the ICC was delegated the authority to interpret the underlying statute to address such an issue. The Petitioner argues that this result is mandated by this Court's decisions in *Chevron USA, Inc v Natural Resources Defense Council, Inc,* 467 US 837 (1984) and *United States v Mead Corp,* ___ US ___; 121 S Ct 2164 (2001). The Michigan Supreme Court's decision, however, does not conflict with either decision.

In its decision, the Michigan Supreme Court quoted directly from *Chevron*, and applied its review criteria. Pet. App., pp. 8a-9a. The Michigan Supreme Court noted that under *Chevron,* a court must first determine whether a statute's meaning is clear; if so, then the Court must apply the statute as written. Pet. App., p. 8a. If, however, the statute is ambiguous, then the court must give deference to the agency's interpretation. *Id.*

In applying *Chevron* to this case, the Michigan Supreme Court first looked to the statute itself. Because it found the plain meaning of the statute to be clear, it followed this Court's directive in *Chevron* that the statute be applied as written. The Petitioner's reference to this Court's decision in *Mead,* which was issued subsequent to the Michigan Supreme Court's decision below, fails to add any luster to its argument.

The issue in *Mead* was whether a Customs Service tariff classification ruling was entitled to *Chevron* deference. In *Mead,* this Court held that "administrative implementation

of a particular statutory provision qualifies for *Chevron* deference when it appears Congress delegated authority to generally make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *supra,* 121 S Ct at 2171. This Court found that a Customs Service tariff classification ruling was not entitled to deference under *Chevron,* but was eligible to claim respect according to its persuasiveness under *Skidmore v Swift & Co,* 323 US 134 (1944). *See,* 121 S Ct at 2168.

The reference to *Mead* as well as the Petition's extended discussion of the nature of the ICC's rulemaking authority, however, are beside the point. This is because the Michigan Supreme Court applied the *Chevron* criteria when making its ruling.

III. THE PETITIONER'S PARADE OF HORRIBLES IS BASELESS.

The Petition claims that certiorari should be granted because this case involves a significant federal statute that impacts 38 states, the nation's trucking industry and has the potential of increasing charges to motor carriers by millions of dollars. The Petitioner's parade of horribles is baseless.

The facts underlying the Michigan Supreme Court's decision are unique to Michigan and not likely to recur in any other state. Nor is there any evidence that states in other jurisdictions will begin canceling reciprocity agreements in an effort to increase revenues as a result of the Michigan Supreme Court's ruling. As noted, Michigan's change in the methodology for determining reciprocity was not undertaken as a revenue increasing measure. Rather, it was done for ease of administration and to ensure Michigan's ability to participate in the SSRS. In short, the measure was revenue neutral in nature. Finally, while the Respondents did change the methodology for determining reciprocity, the Respondents continued to maintain reciprocity agreements with the same states both before and after changing such methodology. In short, no reciprocity agreements in this case were either ignored or canceled. Thus,

the uncertainty that is said to exist is conjecture rather than fact.

IV. THE MICHIGAN SUPREME COURT CORRECTLY RULED THAT THE REGISTRATION FEES CHARGED TO AND COLLECTED FROM YELLOW FREIGHT PURSUANT TO MCL 478.7(4) ARE AUTHORIZED BY THE PLAIN AND UNAMBIGUOUS LANGUAGE OF 49 USC 14504(c)(2)(B)(iv)(III).

At the core of the dispute in this case is whether the Respondents collected *or* charged the $10.00 fee, authorized by MCL 478.7(4), as of November 15, 1991. If the Respondents either charged or collected the $10.00 fee as of November 15, 1991 then 49 USC 14504(c)(2)(B)(iv)(III) authorizes it to continue to charge and collect that fee under the SSRS. As noted, the Respondents actually charged and collected the challenged $10 fee in question from the Petitioner prior to the November 15, 1991 deadline.

The Michigan Supreme Court viewed the fundamental question before it as whether Michigan's reciprocity agreements should be considered in determining what fees were charged and collected as of November 15, 1991. It correctly concluded that the reciprocity agreements were irrelevant in making that determination.

In arriving at its decision, the Michigan Supreme Court made a number of key findings. First, it correctly found that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements. Pet. App., p. 9a. Second, it found that because 49 USC 14504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system", the statute's focus is not on the fees collected from one individual company, but on the fee system that the State had in place on November 15, 1991. Pet. App., p. 9a. By way of further explanation, the Michigan Supreme Court stated under such an interpretation one looks not at the fees paid by the Petitioner in any given year, but at the generic fee Michigan

charged or collected from carriers as of November 15, 1991. Pet. App., p. 9a. It then found that consideration of what fees were charged under reciprocity agreements added a concept not contained in the express language of the statute, concluding that it was not for the ICC or the Court to insert words into the statute. Pet. App., pp. 10a-11a.

The Petition characterizes the Michigan Supreme Court's decision as advancing "virtually nothing in justification of its conclusion." Pet., p. 20. It criticizes the length of the Court's analysis saying it embraces less than two pages of the reported versions. Pet., p. 20. The Petition then argues that even the most strained attempt fails to breathe logic into the Court's ultimate conclusion. Pet., p. 21.

The Petition's hyperbole cannot, however, detract from the sound reasoning employed by the Michigan Supreme Court. The claim that the Court's decision offers virtually nothing in justification of its conclusion is spurious. As noted, the Court's decision was based on the actual language of the SSRS and its express reference to a "fee system." The Petition's attack on the length of the Supreme Court's analysis cannot be taken seriously since the legitimacy or strength of reasoning simply cannot be measured by the number of pages written. Indeed if it were, the Petitioner would be in trouble because the analysis and conclusion of the D.C. Circuit, which the Petitioner ascribes to, is less than a page in length. Finally, the claim that even the most strained attempt fails to breathe logic into the Court's ultimate conclusion is plainly wrong.

Throughout this litigation, the Petitioner has characterized the controversy according to what it was charged with regard to the November 15, 1991 deadline in 49 USC 14504(c)(2)(B)(iv)(III). The Michigan Supreme Court correctly recognized that this theory of the case was fundamentally flawed and inconsistent with the language of 49 USC 14504(c)(2)(B)(iv)(III), whose focus is on whether the State collected or charged a registration fee as of November 15,

1991 and not on what any individual motor carrier was charged.

The flaw in Petitioner's reasoning was succinctly described by the Michigan Court of Claims in a companion case,[6] as follows:

> The fact that an individual carrier was not assessed fees one year and was assessed fees the next year is irrelevant. The determining factor is location and is not focused on the individual carrier's mere existence. This narcissistic argument produces absurd results. It is a basic rule of statutory construction carried over from common law that absurd results should be avoided. *Fortunate v. Dept. of Transp.*, 449 Mich 991; 538 N.W.2d 669 (1995). If, for example, a carrier expands operations into the State of Michigan after November 15, 1991, then the State will be forever precluded from assessing a fee because the State did not previously assess a fee against that carrier's vehicles. Even more absurd is the situation where a carrier was not yet in existence as of November 15, 1991. In that case, all participating states would be precluded from assessing fees against that carrier because it never paid fees to any state prior to November 15, 1991. These possible results are contrary to the legislative intent of creating a fee system for the filing of proof of insurance. *Schneider Motor Carriers, et al v State of Michigan*, November 24, 1997 Opinion. Michigan Court of Claims Docket No. 96-16473-CM. Res. App., pp. 12b-13b.

[6] One other motor carrier contested the Respondents' collection of registration fees under the SSRS in *Schneider Motor Carriers, Inc, et al v State of Michigan*. Michigan Court of Claims No. 96-16473-CM. Schneider's challenge mirrored the one brought by Petitioner.

As for the language of 49 USC 14504(c)(2)(B)(iv)(III), it authorizes:

> . . . a fee for each participating State that is equal to a fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.

The foregoing is a general requirement. The focus is whether the State had a registration fee system in place and not what any individual motor carrier was charged. Inasmuch as Respondents had a registration fee system in place at all relevant times, including the 1991 calendar year, the Michigan Supreme Court correctly found that Respondents' actions fully comply with 49 USC 14504(c)(2)(B)(iv)(III).

V. THE PETITIONER'S RELIANCE ON THE ICC'S DECISION IN *AMERICAN TRUCKING* IS MISPLACED.

Throughout the Petition, numerous references are made to the ICC's decision in *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 ICC2d 1184 (1993). However, it is important to note that that decision was not even mentioned in either the Michigan Supreme Court's majority decision or in either of the dissents. Additionally, it should be noted that *American Trucking* was not included in the review performed by the D.C. Circuit in *National Ass'n of Regulatory Utility Comm'rs v ICC, supra*. *American Trucking*, however, did figure prominently in the decisions of the lower courts hearing the Petitioner's case. Although the Petition invokes the ICC's *American Trucking* decision in support of its claim that this Court should grant review, it is clear that such reliance is misplaced.

A. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contrary to the statute's plain and unambiguous language because it adds an unwritten qualification.

On August 27, 1993, the American Trucking Associations (ATA) filed a petition requesting the Commission to determine whether certain State actions were inconsistent with the above-cited statutory and regulatory requirements. Specifically, ATA alleged, first, that Kentucky had commenced participating in the new registration program even though, in ATA's view, Kentucky was not eligible to participate. ATA alleged, second, that Texas was ignoring the requirement that fees be frozen as of November 15, 1991, and was charging all carriers an across-the-board fee of $10. In this regard, ATA pointed to the Commission's determination that States must continue to observe reciprocity agreements that had the effect of reducing carrier fees, citing, *Single State Insurance Registration*, 9 ICC2d at 617-619. As a third point, ATA contended that several participating States (not including Michigan) were attempting to modify or had disregarded their reciprocity agreements and had raised fees beyond the levels that they had charged based on their reciprocity agreements under the previous registration system.

In response to the petition, by notice served September 16, 1993, and published at 58 Fed. Reg. 48,673 (1993), the ICC instituted a declaratory order proceeding and solicited public comment on the issues raised by ATA. Michigan did not file comments or otherwise participate in this proceeding because none of the issues raised in the ATA petition involved Michigan's implementation of the SSRS. In fact, ATA's proposal to freeze State reciprocity rules in effect as of November 15, 1991, was fully consistent with the changes to Michigan's reciprocity rules effectuated in September of 1991. Unbeknownst to Michigan, however, Yellow Freight filed comments which went beyond the issues identified in the ICC notice and raised in its comments the issue of whether the phrase "fees charged or collected as of November 15, 1991" was intended to include only fees related to the 1991

registration year and not the 1992 registration year. 9 ICC2d at 1192.[7]

Michigan was not served with Yellow Freight's comments nor did it otherwise have any actual or constructive notice that this issue had been raised. Notwithstanding the absence of any comments from parties on the other side of the issue, and without any discussion or analysis, the ICC concluded as follows:

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[7] Specifically, Yellow Freight's comments stated:

> In the case of Michigan, Yellow Freight received reciprocity on the 1991 Michigan fees because of its Illinois base plate. As a result, Yellow paid zero fees to Michigan for 1991. *In 1992 Michigan changed the agreement* to reflect principal place of business and *the fee increased to $10.00 per vehicle.* Because of the size of Yellow's fleet *it purchased 1992 bingo stamps well in advance of display deadlines* to complete the administrative process. Now *Michigan advises* Yellow that its *fee under SSRS is $10.00 per vehicle solely* because Yellow *purchased its 1992 stamps under the new agreement prior to November 15, 1991.* Yellow Freight Comment, September 24, 1993, pg. 3. (Emphasis added.) Res. App., p. 22b.

Michigan, however, changed its reciprocity rules effective September 1991, not in 1992 as Yellow Freight alleged. Contrary to Yellow Freight's comments, Michigan did not advise Yellow Freight that its fee under the SSRS was $10.00 "solely because Yellow purchased its 1992 stamps prior to November 15, 1991." Yellow Freight's $10.00 per vehicle fee was due and owing, because of the change in the method of establishing reciprocity effective September of 1991. Moreover, the 1992 fee renewal applications setting forth the $10.00 charges under these revised reciprocity rules were mailed to all interstate carriers in September 1991 and were payable no later than December 31, 1991. Accordingly, the $10.00 registration fee was charged prior to November 15, 1991. Thus, Michigan charged Yellow Freight the $10.00 fee per vehicle under the SSRS because that is the fee that Michigan was charging prior to November 15, 1991 not because Yellow Freight purchased its stamps early. Notably, Michigan never changed the $10.00 per vehicle fee that was charged and collected prior to and after November 15, 1991. The sole change was to the basis of determining reciprocity.

> Yellow Freight has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find. 9 ICC2d at 1195.

The ICC's finding is contrary to the unambiguous language of the statute because it adds an unwritten qualification to the statute. That is, under the ICC's interpretation not only must the fees be collected and charged as of November 15, 1991, but they must also be for fees for the 1991 registration year. However, there is no language in the statute that limits the fees charged or collected to the 1991 registration year. In short, the ICC has rewritten the statute.

B. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* renders meaningless Congress's decision to use a day-specific date, November 15, 1991, as the cut-off deadline.

It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. *Plaut v Spendthrift Farm, Inc.*, 514 US 211; 115 S Ct 1447; 131 L Ed 2d 328 (1995); *Sutherland Stat Construction*, §§ 46.06 (6th ed. 2000). No clause, sentence, or word shall be construed as superfluous, void, or insignificant if the construction can be found that will give force to and preserve all words of the statute. The importance of respecting the words chosen by Congress is evidenced by numerous decisions by this Court and various United States Circuit Courts. *Bridger Coal Co v Director Office of Workers Compensation*, 927 F2d 1150 (CA 10 1991); *Lake Cumberland Trust, Inc v United States Environmental Protection Agency*, 954 F2d 1218 (CA 6 1992); *United Technologies Corp v O.S.H.A.*, 836 F2d 52 (CA 2 1987).

Two decisions from the D.C. Circuit are particularly instructive in demonstrating that the statutory language chosen by Congress must be respected. First, in *Wisconsin Electric Power Co v Department of Energy*, 250 US App DC 128; 778 F2d 1 (1985), the D.C. Circuit held that an ongoing fee levied on the nuclear generation of electricity applied only to electricity generated and sold, but did not apply to the electricity that the generating plant itself consumed. In holding so, the Court rejected a Department of Energy interpretation that nullified certain language in Section 302 of the Nuclear Waste Policy Act of 1982, 42 USC 10222, stating:

> The utilities' reading of the statute comports with the plain language of the measure. In contrast, by the agency's interpretation, the two words "and sold" could just as readily have been left out of the statute in the first instance; indeed, the practical effect of DOE's interpretation is to blue pencil out two words in an already brief one-sentence provision.
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> * * *
>
> *The Secretary's interpretation would thus have the unhappy result of obliterating express language from the subsection (a)(2)* provision, in contravention of long-settled principles of statutory construction. *** *Where the language Congress chose to employ is clear, the duty of the judiciary is likewise clear. We must follow that language and give it effect.* (citations omitted). 778 F2d at 3-4. (Emphasis added.)

Second, in *Indiana Michigan Power Co v Dep't of Energy and United States*, 319 US App DC 209; 88 F3d 1272 (1996), the D.C. Circuit reviewed an agency interpretation of 42 USC 10222(a)(5)(B) that provided that in return for the payment of fees, the Department of Energy "beginning not

later than January 31, 1998, will dispose of the high level radioactive waste or spent nuclear fuel" from commercial nuclear power plants. The Department of Energy had argued that its obligation to take nuclear waste by the January 31, 1998 deadline was conditioned upon the existence of an operational repository. The D.C. Circuit disagreed, stating:

> Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the quid pro quo created by Congress. 88 F3d at 1276.

Likewise, the ICC interpretation in *American Trucking* is not an interpretation but a rewrite. Such a reading of the SSRS similarly blue pencils out and obliterates the express language of the SSRS in establishing the November 15, 1991 deadline and blue pencils in the words "for the 1991 calendar year." Michigan's fee, as applied to Petitioner, both before and after the change in the methodology for determining reciprocity, never exceeded $10 per vehicle. Moreover, Michigan actually collected $10 per vehicle from Yellow Freight before November 15, 1991, and without protest.

C. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is erroneous since it effectively moves the cut-off deadline of November 15, 1991 back to the fall of 1990.

The ICC's interpretation in *American Trucking* countermands the intent and specific directive of Congress by effectively moving the Congressional imposed cut-off date of November 15, 1991 back to the fall of 1990 when the fees for

the registration year 1991 were collected by the States. The ICC's *American Trucking* interpretation is contrary to the general principle that legislation is prospective only, and does not have retroactive effect unless that intent is stated in the clearest terms.[8] Retroactive effect should be strictly construed, and Congress's express retroactive date of November 15, 1991 is not subject to agency tinkering and misinterpretation. The ICC's attempt to move the date retroactively further back is not supported by language in the SSRS and it cited no basis for this interpretation.

D. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contrary to Congress's intent because it frustrates the goal of achieving uniformity in fee payment and collection and is inconsistent with the long-term practice of the states to collect registration fees in the fall.

The ICC's interpretation in *American Trucking* is contrary to the overall intent and purpose of the SSRS which was to promote uniformity and administrative efficiency with respect to fee payments and their collection. As a relevant Congressional Report states:

> Fee revenues under this system must be collected through a streamlined administrative process established by Section 406 known as the "single state" or "base state" registration system. Under the single state registration system, a carrier will pay its annual fees to a single state (its base state) and that state will distribute the collections to other participating states in which the carrier's vehicles operate. *This system is to be instituted* by the Interstate Commerce Commission, in consultation with the participating states and the trucking industry, *in such a manner as to eliminate as*

[8] *Kaiser Aluminum & Chemical Corp v Bonjorne, et al,* 494 US 827; 110 S Ct 1570 at 1576; 102 L Ed 2d 842 (1990).

> *much of the paperwork and other compliance burdens as possible.* Section 405 specifies that the only evidence of payment or other identification a vehicle must carry under this system is a copy of the receipt given the carrier by the base state. H.R. Conf. Rep. No. 102-104, 102nd Congress, 1st Sess 437-438 (November 26, 1991). Reprinted in 1991 USCCAN 1679, 1817-1818. (Emphasis added.)

As the D.C. Circuit noted in *Wisconsin Electric, supra:* "[l]ike the judiciary, the agency is bound to follow the law as Congress passed it and the President signed it." 778 F2d at 8. The ICC is not at liberty to override the clearly expressed intent of Congress that the cut-off date for fee changes is November 15, 1991. The ICC moved the deadline back nearly a year when it ignored the statutory November 15, 1991 deadline.

The ICC's interpretation in *American Trucking* is inconsistent with the long-term practice of the states, on a nationwide basis, to collect state annual application or renewal fees for the next registration year in the fall of the preceding year. Additionally, the multi-state practice under the SSRS follows the same pattern, i.e. the collection of fees for the next year occurs in the fall of the preceding year.[9] If Congress had intended to countermand a nationwide practice in this portion of the SSRS statute, surely it would have explicitly so stated. Michigan has always collected and continues to collect these state SSRS fees each fall for the next registration year.

[9] The practice of collecting fees for renewals in the fall of each year for the next calendar year is consistent with Michigan law concerning all other state motor carrier fees (e.g., Art VI, MMCA, MCL 478.6, *et seq*). Further, that same procedure is expressly mandated under the present multi-state manual used to administer the collection of SSRS fees.

E. The interpretation of 49 USC 14504(c)(2)(B)(iv)(III) in *American Trucking* is contradicted by its interpretation of the day-specific deadline of January 1, 1991 in 49 USC 14504(c)(2)(D) and inconsistent with its regulations implementing the SSRS.

After Respondents implemented the change from base-plating to principal place of business for determining reciprocity with respect to registration fees, Congress continued its work on proposed legislation that was later to become the SSRS. The history of this legislation helps explain why Congress chose November 15, 1991 as the cut-off date for fees. The House Bill, which passed on October 23, 1991, would have eliminated the state registration system and the related fees. In their place, the bill would have provided for a one-time $50 million grant to "bingo" program States, including Michigan, to offset unexpected revenue losses. The Senate Bill, passed on October 31, 1991, did not deal with the subject at all. The provisions creating a single state registration system emerged from the Conference Committee convened during November of 1991. See, H.R. Conf. Rep. No. 404, 102nd Cong., 1st Sess. 437 (1991), *reprinted in* 1991 USCCAN, 1526, 1679, 1817. The ISTEA, which included the SSRS, was enacted on November 26, 1991.

There are three statutory provisions pertinent to this issue. First, 49 USC 14504(c)(2)(D)[10] provides that:

> Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under Part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection.

[10] Originally codified as 49 USC 11506(c)(2)(D).

The foregoing section like 14504(c)(2)(B)(iv)(III) contains a day-specific deadline. Significantly, when the ICC "interpreted" the foregoing section, it found the January 1, 1991 deadline to be clear:

> We conclude that Kentucky is not eligible to participate in the Single State Registration System. The statute is clear that only states which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under the predecessor system at 49 C.F.R. Part 1023 are eligible to participate.
>
> * * *
>
> Significantly, while every participating state required carriers to use the Form D "bingo" card described in Subpart D, Kentucky did not. *As of January 1, 1991,* if a Kentucky enforcement officer were to ask a driver to present a cab card evidencing vehicle registration and the driver presented only a "bingo" card, the driver would have been subject to a fine.

American Trucking Associations, supra, 9 ICC2d at 1192-1193. (Emphasis added.) Thus, inexplicably, while the ICC finds the January 1, 1991 deadline in 49 USC 14504(c)(2)(D) to be a clear and day-specific date and enforces it as such, it finds the November 15, 1991 deadline in 49 USC 14504(c)(2)(B)(iv)(III) to mean something other than the November 15, 1991 day-specific date that is plainly stated. The better, more consistent view is that both day-specific deadlines should be given full force and effect.

Second, § 14504(c)(2)(B)(iv)(III)[11] provides that each participating State shall establish a fee system … that …"will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or

[11] Originally codified as 49 USC 11506(c)(2)(B)(iv)(III).

charged as of November 15, 1991." The statute further provides, at § 14504(c)(2)(C), that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce."

The dual purposes of the legislation as made clear by the Conference Committee, were "to benefit the interstate carriers by eliminating unnecessary compliance burdens" and "to preserve revenues for the states which had participated in the bingo program." H.R. Conf. Rep. No. 404, 102nd Cong., 1st Session 437 (1991). To further these ends, Congress directed the ICC to prescribe regulations implementing a single state registration system consistent with the provisions of Section 4005 of the ISTEA. Pursuant to this statutory directive, the ICC issued on May 11, 1992, an Advance Notice of Proposed Rulemaking requesting public participation, 57 Fed. Reg. 20,072 (1992) and on January 22, 1993, the ICC issued a Notice of Proposed Rulemaking requesting public comments. 58 Fed. Reg. 5,951 (1993). The ICC received 52 comments, including comments from the MPSC. Two major issues emerged from the comments: (1) who will be responsible for generating copies of registration receipts; and (2) whether participating States must consider fees charged under reciprocity agreements among the states when determining the fees charged as of November 15, 1991. 9 ICC2d at 612. Regarding the second issue, which is pertinent to the fee collection issue, the American Trucking Associations (ATA) urged the ICC to require fees to be based on "the terms of the [reciprocity] agreement in effect as of November 15, 1991." *Id.* at 618. Notably, no party raised the issue of whether Congress intended the phrase "fees collected as of November 15, 1991" to refer to fees related to the 1991 registration year but not the 1992 registration year.

On May 18, 1993, in *Single State Insurance Registration Ex Parte No. MC-100 (Sub-No. 6),* 9 ICC2d 910 (1993), the ICC adopted final regulations replacing the multi-

State motor vehicle registration system. Under the implementing regulations, carriers were required to: (1) file proof of insurance with a single participating registration State; (2) pay fees to the State to be allocated among all participating States in which the carrier operates; and (3) keep in each of their vehicles a copy of a receipt issued by their registration State. The Commission's new regulations were codified at 49 CFR Part 1023. Several provisions of the regulations are pertinent to the issue in this case. First and foremost, the ICC in *Single State* did not construe the phrase "fees charged or collected as of November 15, 1991" as relating only to fees for the 1991 registration year but excluding fees charged or collected by that date but for the 1992 registration year. Instead, the ICC's implementing regulation mirrored the statutory requirement limiting fees to those that were "charged or collected" as of November 15, 1991. *See,* 49 CFR 1023.4(c)(4)(ii). Second, the ICC adopted regulations requiring carriers to register in the state in which they maintain their principal place of business. 9 ICC2d at 620. Third, the ICC concluded that reciprocity agreements should be frozen as of November 15, 1991. *Id.* at 618-619.

Respondents' actions are entirely consistent with the ICC's foregoing determination with respect to its regulations. Respondents did not raise its fees either before or after November 15, 1991. Michigan's fees were $10.00 at all relevant times, in accordance with MCL 478.7(4). The only change to the Michigan fee system was to replace its base-plating method of determining reciprocity with a principal place of business method. This change was undertaken in early 1991 and put into effect in September 1991 when Michigan mailed applications to motor carriers operating vehicles in Michigan. As such, this change was entirely consistent with the ICC's holding in *Single State Insurance Registration,* 9 ICC2d 610 (1993), 618 that froze "the terms and conditions of [reciprocity] agreements in effect as of November 15, 1991 ..."

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: September, 2001

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STATE OF MICHIGAN

BEFORE THE COURT OF CLAIMS

YELLOW FREIGHT SYSTEM, INC.,

Plaintiff-Claimant, Case No. 95-15706-CM

v Hon. William E. Collette

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL AND JOHN L. O'DONNELL,

Defendants-Respondents. /

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AFFIDAVIT OF THOMAS R. LONERGAN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

I, Thomas R. Lonergan, having been duly sworn and deposes state as follows:

1. I am presently and was at all times pertinent to the above action, employed by the Michigan Public Service Commission in the capacity as Director of the Motor Carrier Regulation Division.

2. I have personally reviewed the Plaintiff's Complaint filed in the above action and am familiar with the contents of same.

3. Contrary to the factual allegations contained in Plaintiff's Complaint the following is a true and accurate description of the events which are the subject of the Plaintiff's Complaint:

a. Prior to 1988 the Michigan Public Service Commission had reciprocity agreements with several states and provinces pertaining to fees for trucks in interstate commerce.

b. 347 Public Act 1988 amended the Motor Carrier Act and established a new requirement that the Michigan Public Service Commission begin charging regulatory fees for vehicles of interstate, foreign and interstate exempt motor carriers operated in Michigan.

c. 347 Public Act 1988 was amended by 221 Public Act 1989.

d. Until that time, the State of Michigan had not issued cab card stamps to interstate, foreign and interstate exempt motor carriers.

e. Commencing in the fall of 1989 for the calendar year beginning January 1, 1990, the Michigan Public Service Commission began issuing cab card stamps, commonly referred to as "bingo stamps".

f. Under the above act, Michigan was required to charge vehicles from other states $10.00 for the stamp. However, the act permitted the Commission to enter into reciprocal agreements with other states or provinces of Canada that did not charge vehicles licensed in this state regulatory fees, permitting the waiving of $10.00 fees to vehicles licensed in those provinces or states.

g. On August 2, 1989 Chairman William Long sent a letter to all states and provinces canceling any previous reciprocity agreements.

h. For purposes of the new act, the Michigan Public Service Commission Staff contacted other states and provinces to determine if they were in fact charging a fee to Michigan vehicles.

i. The Public Service Commission made a policy decision not to charge a fee to carriers with vehicles registered in states or provinces which did not charge Michigan-based carriers a fee.

j. Under the above-described system, Yellow Freight which had 3,730 vehicles base plated in Illinois and Indiana, was not charged for those cab card stamps as those states did not charge fees for vehicles based in Michigan. Yellow Freight was charged for five vehicles which were base plated in Oklahoma. (Attachment 1). This system was in effect for calendar years 1990 and 1991.

k. After two years of administration of the cab card stamp program using the system of determining fees and reciprocity waiver based on the state of vehicle registration, it became evident that this system was unduly complex and inefficient to administer. A cab card application could include vehicle registrations in many different states requiring several calculations and the possibility of error in reciprocity waivers. It also became apparent that Michigan was one of very few, and possibly the only, state using this system as opposed to the principal place of business system. Further, work was proceeding on legislation in Washington to mandate a single base state program and this would require a uniform approach by the participating states.

l. The Public Service Commission made a policy decision in 1991 to change to a system utilizing the principal place of business as the basis for fees and reciprocity. This decision was made in early 1991 and the revised renewal applications were mailed to all interstate motor carriers in September of 1991. This clearly pre-dated the effective date for freezing fees and reciprocity, being November 15, 1991.

m. The above changes are reflected in the attached cab stamp application forms. Attachment No. 1 is the renewal for the 1991 cab stamps and indicates in paragraph 8 that the fee schedule is based on the fee charged by the state in which the company's vehicles are commercially base plated. Attachment No. 2 is the renewal form mailed and used in 1991 for the 1992 registration year. This form states that the fee schedule is based on the state or province in which the company is based.

n. Thus, no reciprocity agreements were changed. Rather, for efficiency reasons and to be in compliance with the SSRS the MPSC based reciprocity on the state in which a company was located rather than the states in which the vehicles were base plated.

o. Under the "base plating" system Yellow Freight, with a substantial number of trucks base plated in the states of Illinois and Indiana, did not pay fees due to reciprocity arrangements with those states.

p. After the system was changed basing reciprocity on a company's principal place of business, Yellow Freight had to pay fees as its principal place of business was in Kansas. Michigan had no fee waiver with the State of Kansas. Other motor carriers would have paid less as a result of the change if they were based in a state with which Michigan had a fee waiver.

q. 49 USC § 11506 sets forth the fee systems and states in part:

> Will result in a fee for each participating state that is equal to the fee, not to exceed $10.00 per vehicle, that such state collected or charged as of November 15, 1991;

Pursuant to the above, it was determined that fees would be based on fees collected and charged as of November 15, 1991.

r. In the instance of Yellow Freight that fee was based on the fees charged and collected as of November 15, 1991. (See Exhibit 2). The application form with payment was received on October 3, 1991 as well as payment in full. This established that the Michigan system in place as of November 15, 1991 was the "principal place of business" system and has been continued each year thereafter.

s. The above method of fee collection was made in good faith with the understanding that same was in accord with the newly enacted SSRS which was to become effective on January 1, 1992.

4. At all times during my contacts with the Plaintiff, if any, I acted in good faith, within the scope of my authority and in my official capacity as a public employee of the State of Michigan and not in my personal capacity.

5. If sworn I can competently testify to the facts set forth in this Affidavit.

Further affiant sayeth not.

/s/
Thomas R. Lonergan, Director
Motor Carrier Regulation Division
Michigan Public Service Commission

Subscribed and sworn to before me this
9th day of October, 1995.

/s/
Pamela A. Cabic, Notary Public
Eaton County, Michigan
My Commission Expires: 2/4/98

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

SCHNEIDER NATIONAL CARRIERS, INC.;
SCHNEIDER TRANSPORT, INC.;
SCHNEIDER NATIONAL BULK CARRIERS, INC.;
SCHNEIDER TANK LINES, INC.;
and
SCHNEIDER SPECIALIZED CARRIERS, INC.,

Plaintiffs-Claimants,

v

STATE OF MICHIGAN,
MICHIGAN DEPARTMENT
OF TREASURY AND ITS STATE
TREASURER; MICHIGAN DEPARTMENT
OF CONSUMER AND INDUSTRY SERVICES
(FORMALLY MICHIGAN DEPARTMENT OF
COMMERCE) AND ITS DIRECTOR;
MICHIGAN PUBLIC SERVICE COMMISSION
AND COMMISSIONERS, JOHN G. STRAND,
JOHN C. SHEA, AND DAVID A. SVANDA;
AND THOMAS LONERGAN,

Defendants-Respondents.

OPINION AND ORDER

Hon. Peter D. Houk

File No. 96-16473-CM

OPINION

This matter is before the Court on Defendants'-Respondents' Motion for Summary Disposition and Plaintiffs'-Claimants' Motion for Partial Summary Disposition and Alternative Motion to Stay Proceedings and Refer Issues to the United States Department of Transportation. Having reviewed

the briefs and heard Oral Argument on June 16, 1997, the Court issues the following Opinion and Order:

Facts

The Plaintiffs-Claimants (Schneider) are international for-hire trucking companies doing business in Michigan. Schneider is requesting a refund of all fees paid under the Motor Vehicle Single State Registration System (SSRS). 49 USC 11506 *et seq*, recodified at 49 USC 14504, effective January 1, 1996. The SSRS is part of the Intermodal Surface Transportation Efficiency Act. 49 USC 101 *et seq*. Under the SSRS, states may assess interstate motor carriers a fee of no more than $10 per vehicle, not to exceed the amount that the state collected or charged as of November 15, 1991. This Opinion will reference 49 USC 11506. The corresponding parts of section 14504 are substantially the same to their counterpart in section 1506. The Court recognizes that Plaintiffs' claim for refund for fees paid in 1996 and after are pursuant to section 11504.

Under rules promulgated by the ICC at 49 CFR 1022, states entered into various reciprocity agreements. For purposes of determining reciprocity, Michigan would determine in which state a vehicle was registered. If that state had a reciprocity agreement with Michigan, the company would be assessed fees accordingly. Michigan and Illinois had such an agreement. Under Michigan's reciprocity agreements, Michigan did not charge fees for vehicles registered or "base plated" in states which did not charge fees for Michigan vehicles in interstate commerce. Under this system, Schneider vehicles were not charged cab stamp fees for vehicles base plated in Illinois, as Illinois did not charge fees for vehicles base plated in Michigan.

The ICC promulgated rules at 49 CFR 1023 whereby each motor carrier would pay all assessed fees through its home state. Each home state was required to collect and remit fees charged by other states on their behalf. The purpose of the

act was for efficiency. In expectation of the enactment of the SSRS, Michigan changed its method of determining reciprocity. The Michigan Public Service Commission decided that reciprocity was to be based on the principle place of business of a carrier rather than the state in which the vehicle was base plated. This change was effected in 1991.

For the registration year 1991, Schneider's vehicles were base plated in Illinois. Accordingly, Michigan did not charge fees to Schneider for the calender year 1991, due to the informal reciprocity agreement it had with Illinois. However, for 1992 and beyond, Michigan did charge the ten dollar ($10) fee to Schneider since Schneider's principle place of business is Wisconsin, a state which never shared reciprocity with Michigan.

Schneider filed a claim for refund for all fees paid for the years 1994-1997. The State denied all claims with the exception of an overpayment made for 1996.

Analysis

TIME BARRED

The first issue is whether Plaintiffs' claims are time barred. MCL 600.6431(1); MSA 27A.6431 requires that a plaintiff file a written notice of intention to file a claim against the state within one year after the claim has accrued. In this case, Plaintiffs' claims may not be dismissed because Defendant produced no evidence attempting to show that it was actually prejudiced. See May v Dept of Natural Resources, 140 Mich App 730; 365 NW2d 192 (1985).

SSRS

The pertinent part of the Federal Statute which governs the Single State Registration System is at 49 USC 11506(c)(2) and reads in part as follows:

(2) Specific requirements.—

(A) Evidence of certificate; proof of insurance; payment of fees.—Under amended standards, implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle—

(i) to file and maintain evidence of such certificate or permit;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system.-Such amended standards—

* * *

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that . . . (III) will result in a fee for each participating State that is equal to the fee not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

* * *

(C) Prohibited fees. The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce. (Emphasis added).

The statute limits the fee charged to the fee that the state charged as of November 1, 1991 with the limitation that the fee may not exceed $10.00.

Plaintiffs rely on Yellow Freight System, Inc v State of Michigan, Court of Claims No. 95-15706 CM, March 13, 1996, for its claim of refund. Yellow Freight was granted summary disposition and a refund of SSRS fees paid for the years 1994-1996. Those fees were paid under SSRS through Yellow's base state of Kansas. The case is now on appeal to the Court of Appeals.

In Yellow Freight, the Court of Claims granted deference to the ICC's decision in American Trucking Ass'ns - Petition for Declaratory Order - Single State Insurance Registration, 9 ICC 2d 1184 (1993). The State of Michigan took the position that although no fee was charged or collected for 1991, there was a fee for 1992 that was charged and collected in 1991 prior to November 15, 1991. The State believed that, therefore, they were permitted to charge the ten dollar ($10) fee in 1994 and beyond. Yellow asserted that since no fee was charged in 1991, the State was precluded from assessing a fee.

The present issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991" relates to fees charged for the 1991 registration year or for the 1992 registration year was raised by Yellow in American Trucking. Id at 47,364. The ICC interpreted the SSRS, stating that "[w]e think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, . ." Id at 47,365. Yellow advanced the interpretation to the Court of Claims, which in turn, deferred to the ICC interpretation. Yellow, supra at 4. The result was a refund ordered. Id. Schneider adopts this argument claiming that it is in accord with Congressional intent to freeze fees as of November 15, 1991.

The SSRS is a comprehensive regulatory scheme created under federal law. Congress has charged the ICC with its implementation. This court would normally grant deference to the statutory interpretations of the Act by the ICC. However, it is this court's opinion that the Commission erred. The question presented by Yellow to the ICC relates to which year the charged fees apply. The reply by the ICC, however, concerns the year in which the fees are to be 'charged or collected. The reply does not answer the question. The reply cannot refer to 1991 fees, as Plaintiffs interpret. This would lead to absurd results as discussed below. Even assuming that the ICC did properly address the issue presented, the only logical interpretation is that the ICC is referring to 1992 fees that are charged or collected in 1991.

This Court disagrees with the Plaintiffs' argument, that because the statutory language concerns fees charged or collected for the 1991 registration year, and that they did not pay fees in 1991, that they do not have to *ever* pay fees because the statutory language freezes the fees owed to those charged or collected as of November 15, 1991. The State collects application or renewal fees in the fall of the year for the next calender year. Defendants assert that this is done to ensure proper payment and registration for services to be provided for an entire year. The basis for determining the amount to be charged or collected from a carrier is by the location of the company's principle place of business. The fact that an individual carrier was not assessed fees one year and was assessed fees the next year is irrelevant. The determining factor is location and is not focused on the individual carrier's mere existence. This narcissistic argument produces absurd results. It is a basic rule of statutory construction carried over from common law that absurd results should be avoided. Fortunate v Dept of Transp, 449 Mich 911; 538 NW2d 669 (1995). If, for example, a carrier expands operations into the State of Michigan after November 15, 1991, then the State will be forever precluded from assessing a fee because the State did not previously assess a fee against that carrier's vehicles. Even more absurd is the situation where a carrier was not yet in

existence as of November 15, 1991. In that case, all participating states would be precluded from assessing fees against that carrier because it never paid fees to any state prior to November 15, 1991. These possible results are contrary to the legislative intent of creating a fee system for the filing of proof of insurance.

In summary, the interpretation that the effective date of November 15, 1991 pertains to fees collected for the 1991 calendar year is contrary to the plain meaning of the statute. The proper interpretation is that the SSRS applies to fees charged and collected for the 1992 calender year. Therefore, Schneider is responsible for the fees as their principle place of business is Wisconsin, a state without reciprocity with Michigan.

NOTICE

The notice issue is of limited applicability to this case as the court does not defer to the above ICC interpretation. The notice issue is applicable, however, to Defendants' Tenth Amendment argument.

Defendants argue that the ICC declaratory order decision in American Trucking is not binding because the State did not receive adequate notice of the proceedings, the issues did not involve Michigan issues and, since Michigan did not participate, the ICC did not have the benefit of Michigan policy. Plaintiffs argue that an agency need not conduct an individualized hearing and adjudication before issuing a declaratory ruling under 5 USC 554(e).

An "'order' means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 USC § 551(6). "'Adjudication' means agency process for the formulation of an order." 5 USC § 551(7). Section 554 which applies in all cases of adjudication with six exceptions that are not applicable

here, provides that persons entitled to notice of an agency hearing shall be timely informed of the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted. The Interstate Commerce Commission is bound by requirements of reasonable notice proscribed in 5 USC §54. See North Alabama Exp, Inc v US, 585 F2d 783 (CA 5 1978).

In the instant case, the ICC published notice of the declaratory order proceeding in the Federal Register. 58 FR 48673 (1993). The notice stated that

> The Commission is acting in view of evidence suggesting that States may be in violation of 49 CFR 1023.2(a), 1023.4(c)(4), and 1023.4(g). This action is part of the Commission's continuing effort to clarify its regulations and facilitate smooth operation of the registration system. The Commission is providing interested persons an opportunity to participate in the proceeding and is inviting their comments. This published notice was sufficient to inform the Defendants and all interested parties of the declaratory proceeding and fully complies with 5 USC §554(b), the notice requirement for adjudications.

10TH AMENDMENT

Defendants assert that the ICC finding that "[i]t is inconsistent with the statute for a state to renounce or modify a reciprocity agreement so as to alter any fee charged or collected as of November 15, 1991, under the predecessor registration system", violates the Tenth Amendment of the United States Constitution. American Trucking, Supra at 47,366. Defendants suggest that if the Federal Government forces the States to enter into, alter or repeal a compact, it is a violation of the 10th Amendment.

The United States Court of Appeals in National Association of Regulatory Utility Commissioners v Interstate Commerce Utility Commission, 41 F3d 721 (DC Cir 1994), opined that it is irrelevant whether the Legislature focused on reciprocity and held that the ICC properly determined in American Trucking that, under the ISTE amendments, participating states could not collect fees under new systems in excess of those charged and collected under pre-existing reciprocity agreements.

The Michigan system is consistent with National Association. Michigan merely changed its method of determining which carrier's vehicles were to be assessed fees from the base plating method to the principle place of business of the carrier. Michigan has always, and continues to share reciprocity with Illinois. Likewise, Michigan does not, nor has it ever shared reciprocity with Wisconsin. Michigan continues to charge $10 per vehicle under the ISTEA amendments as it did under the former system. Therefore, the $10 fee charged is not in excess of a pre-existing reciprocity agreement. Neither the ICC's statements concerning reciprocity or the SSRS itself run contrary to the 10th Amendment.

COMMERCE CLAUSE VIOLATION

The parties agree that the underlying statutory authority that allows Michigan to collect fees pursuant to the SSRS is MCL 478.7(4); MSA 22.565(l)(4). That section of the statute reads in relevant part that "[t]he annual fee levied-on each interstate or foreign motor vehicle operated in this state and licensed in another state or providence of Canada shall be $10.00. . . Plaintiff argues that this Section is not consistent with the SSRS and therefore violates the Commerce Clause. Specifically, Plaintiff argues that section 7 authorizes collection of fees for registration of vehicles, while the SSRS at 49 USC 11506(2)(A)(ii) only authorizes collection of fees "to file satisfactory proof of required insurance or qualification as a self-insurer." Plaintiff further claims that this inconsistency is not in accordance with 49 USC 11506(c)(2)(B)(iv) of the

SSRS and pursuant to 49 USC 11506(c)(2)(C), creates a burden on interstate commerce.

A thorough reading of MCL 478.7; MSA 22.565(1) suggests that the statute authorizes fees other than for vehicle registration. MCL 478.7(1) does require the carrier to pay the necessary registration fees before operating the vehicle in interstate commerce. However, 1933 PA 254 as amended by 1989 PA 221 grants the Michigan Public Service Commission broad powers in the arena concerning our public highways and its use by interstate motor carriers. The purpose of the act is to:

> [p]romote safety upon and conserve the use of public highways of the state; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles operated by carriers of property for hire upon or over such highways; . . . to give the [Michigan Public Service] [C]ommission jurisdiction and authority to fix, alter, regulate, and determine rates, fares, charges, classification, and practices of common motor carriers for such purposes; to require filing with the commission of rates, fares, and charges .... Id.

A copy of a Public Service Commission procedures manual instructs the Commission on how to collect fees pursuant to MCL 478.7(4); MSA 478.7(1)(4). The manual states that "[t]hese fees shall be for filing and maintaining proof of insurance. No other fees shall be collected or assessed either directly or indirectly." MICHIGAN PUBLIC SERVICE COMM'N, SINGLE STATE REGISTRATION SYSTEM PROCEDURES MANUAL (Revised July 1, 1994), p 14. Obviously, fees for the purpose of filing and maintaining proof of insurance is consistent with the stated purpose of the act to promote safety of the public highways. In addition, the broad grant of authority allows the commission to charge and collect fees to further the purpose of the act.

In summary, the legislature implicitly granted the commission the authority to charge and collect fees consistent with the SSRS. The procedures manual is direct evidence that the commission properly assumed that responsibility.

42 USC 1983

For the stated reasons, the Plaintiffs have failed to state a violation of a constitutional right or a federal law. Such a violation would allow a 42 USC 1983 claim. However, Plaintiffs have failed to demonstrate a situation were such a claim exists. Therefore, this claim must be dismissed as to all Defendants.

ORDER

THEREFORE, IT IS ORDERED that for the above stated reasons that Defendants'-Respondents' Motion for Summary Disposition is **GRANTED.**

IT IS FURTHER ORDERED that for the above mentioned reasons, Plaintiffs'-Claimants' Motion for Partial Summary Disposition and Alternative Motion to Stay Proceedings and Refer Issues to the United States Department of Transportation are **DENIED.**

Dated: November 24, 1997

/s/
Hon. Peter D. Houk
Court of Claims Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Mason, Michigan, on November 24, 1997.

/s/
Ann M. Baird
Judicial Assistant

cc: Ronald J. Mastej
Donald L. Keskey
Judith I. Blinn

Before the
Interstate Commerce Commission

American Trucking Associations—
Petition for Declaratory Order
Single State Insurance Registration
Notice No. 41086

Comments by
Yellow Corporation
10777 Barkley
Overland Park, KS 66211

By: Stephen S. Richards
Manager, Government Relations
September 24, 1993

Yellow Corporation submits these comments in response to the Commission's request for comments in the above referenced declaratory order proceeding, published September 9, 1993. Yellow Corporation is the parent company to a family of transportation related firms that includes Yellow Freight System, Preston Trucking and Saia Motor Freight. Our comments; are in support of American Trucking Associations' (ATA) petition requesting the Commission to determine certain states are ineligible to participate in the Single State Insurance Registration (SSRS) program and that certain state actions will result in fees in excess of those charged or collected by participating states on November 15, 1991.

In 1991 Kentucky required an interstate carrier to place a state-assigned KYU number in the Kentucky square on the bingo card. However, they only required a $10 per company renewal or filing fee. Kentucky never required a per vehicle stamp or identifier under PL 89-170. The $10 per vehicle fee collected by Kentucky was required under their "Reciprocity" or "Tax"

card. Kentucky intends to continue requiring the "Reciprocity" card in 1994 and to participate in the SSRS program with a $10 per vehicle fee. If Kentucky is allowed to participate in SSRS, Yellow Freight and Saia will pay an amount $10 per vehicle greater than paid in 1991. We believe Kentucky does not qualify to participate under SSRS since they did not charge or collect a fee under PL 89-170 in 1991. The Commission should prohibit their participation regardless of any fee since Kentucky did not participate in PL 89-170.

Under the "Bingo Stamp" program, Texas participated in numerous reciprocity agreements where carriers paid from 45¢ to $11 per vehicle. Texas has advised participating states that it will cancel these reciprocity agreements and begin charging all carriers a flat $10 per vehicle fee. We believe Texas should not be allowed to charge a flat $10 per vehicle fee and completely ignore the fees charged on November 15, 1991.

The State of Idaho did not fully participate in the "Bingo Stamp" program in 1991. They did not charge or collect a fee for bingo stamps and only required an annual $25 "filing fee". Idaho General Order No. 179B adopted a permanent rule setting the fee for identification of an interstate motor carrier's vehicle at $2 per vehicle. However, this fee was rescinded for the calendar year 1991. While Idaho may have the ability to participate in SSRS, it should not be allowed to collect a fee under SSRS. No fee was collected on November 15, 1991.

The Commission determined in its previous order that states must continue to observe the reciprocity agreements that had the effect of reducing carriers' fees. We believe Texas and Idaho would be in violation of the Commission's order by being allowed to raise their fees to levels above those collected on November 15, 1991.

The most pertinent issue set forth in ATA's petition deals with the determination of fees to be collected by all participating states. Under the "Bingo Stamp" program, several states had entered into reciprocity agreements allowing lower fees based

upon the motor carrier's principal place of business, its vehicle base registration state or type of operating authority held. States, in developing the matrix of fees to be used under SSRS, have assumed all reciprocity was based On principal place of business. This assumption will result in a revenue windfall for the states and impose an economic burden on the motor carrier industry.

Yellow Freight System's principal place of business is Kansas and it will register its fleet under SSRS with the Kansas Corporation Commission (KCC). In 1991, Yellow was exempt from paying bingo stamp fees to the states of Indiana, Michigan and California. In Indiana and Michigan, the exemptions were granted based upon the reciprocity agreements that considered the vehicle's base plate. In California, the exemption was based on Yellow holding both intrastate and interstate operating authorities. Yellow contacted each of these states to clarify the fees to be collected under the SSRS program. In the case of California, two letters were issued by the California P.U.C. instructing Kansas not to collect fees from Yellow Freight System because of their operating authority.

Indiana recognized that they had historically interpreted reciprocity on the vehicle's base plate bur found continuing this practice under SSRS would present "administrative difficulties". Apparently, North Carolina, Oklahoma and Massachusetts also used vehicle base plate to interpret reciprocity agreements. These states had been informed by other participating states that continuing to interpret agreements with base plate would create tremendous amount of confusion under SSRS. Pressure has been applied on these states to convert to a principal place of business arrangement All four states have been reluctant to stay with their historical interpretation and currently are unwilling to recognize their reduced fees. Accordingly, Indiana has not responded to Yellow's request for clarification.

In the case of Michigan, Yellow Freight received reciprocity on the 1991 Michigan fees because of its Illinois base plate. As a result Yellow paid zero fees to Michigan for 1991. In 1992 Michigan changed the agreement to reflect principal place of business and the increase to $10 per vehicle. Because of the size of Yellow's fleet it purchased 1992 bingo stamps well in advance of display deadlines to complete the administrative process. Now Michigan advises Yellow that its fee under SSRS is $10 per vehicle solely because Yellow purchased its 1992 stamps under the new agreement prior to November 15, 1991. We contend that the intent of ISTEA, in establishing the November 15, 1991 date, was to determine the fee for a 1991 stamp required to be purchased on that date. It is not germane what fee Michigan charged on November 15, 1991 for a 1992 stamp. Therefore, the fee charged Yellow for 1991 bingo stamps was zero due to the reciprocity afforded its Illinois based vehicles and the fee under SSRS should continue to be zero for such vehicles.

On two separate occasions, we specifically discussed these issues with our base state administrator. We were informed the KCC staff was contacting each participating state (including those we feel should not be allowed to participate) to verify fees to be collected. It is our base state administrator's opinion that in collecting fees for other states, Kansas is acting in an agency capacity and would be compelled to collect fees as instructed. The KCC will leave the debate over reduced fees between Yellow Freight System and the respective states. It will then be Yellow's responsibility to attempt to get refunds from those states for which incorrect fees were collected. As a result, Yellow Freight System will be forced to pay fees higher than those paid under PL 89-170 and those collected on November 15, 1991.

We believe the intentions of the Kansas Corporation Commission in collecting higher fees are in direct conflict with the Commission's order requiring recognition of reciprocity agreement fee levels. Furthermore, if Yellow Freight is required to apply to individual states for refunds of fees paid,

Yellow will not receive any benefits from the base state. registration system One of the underlying principles of SSRS is to provide motor carriers a reduction in administrative effort in registering their interstate operating authority. Requirements to file for refunds with individual states for incorrect fees collected by a base state only add to the burden of motor carriers in registering their operating authority. Yellow Freight has not received any indication that states will honor these refund requests since many state agencies do not have the administrative procedures allowing for refunds of SSRS fees. Furthermore, we have been told that certain states have indicated to carriers that they must deal strictly with their base state in all SSRS matters. This will undoubtedly leave the carrier in a position of not being able to even file for a refund.

We recognize that the majority of motor carriers will not encounter these difficulties in determining the correct fees. However, states must recognize all reciprocity agreements and collect only the appropriate fee whenever these exceptions apply to a carrier's operation. We offer as a solution that motor carriers be allowed to provide to their base State documentation supporting reduced fee for 1991 and that the carrier continues to qualify for the fee reduction. Those states having reciprocity agreements, based on other than principal place of business, could develop a list of corresponding states and fees and provide this list to all participating states. This would provide the states knowledge of the reduced fee levels, but place the responsibility on the carrier to request and support a lower fee.

While additional administrative procedures would be required, states must determine fees utilizing all previous reciprocity agreements, otherwise carriers will be burdened with an even greater administrative process than under the "Bingo Stamp" program and potentially be required to pay higher fees. We believe the intention of states to only collect fees under SSRS utilizing the carrier's principal place of business violates the Commission's Order to determine fees observing all reciprocity agreements. Since the SSRS program must be

implemented by January 1, 1994, the Commission must issue its decision expeditiously. All carriers within the Yellow family will need a minimum of 45 days to install the receipt in each of its over 10,000 motor vehicles. We will need an additional 30 days to file our application and obtain the valid receipt with the different state agencies. That only allows a 15 day period for the Commission to issue its decision and the states to adjust the fee schedule.

Respectfully Submitted

Yellow Corporation

/s/
Stephen S. Richards
Manager, Government Relations
913-967-4353

INTERSTATE CAB CARD STAMP APPLICATION
Form B
(Authorized by PL 89-170)

RECEIVED
M.P.S.C.
OCT 3 1991

Authorities & Registration
Division

Instructions:
- Filing this form is required to request Cab Card Stamps. Failure to file may result in citations by the Michigan State Police.
- Type or Print legibly in ink.
- Please read the instructions printed on the back.

1. Application For:
___ New (Original Registration)
X Renewal
___ Additional Stamp registration during the year

2. Check One:
___ ICC Exempt
X ICC Required – Enter the type of Authority below:
X Certificate
___ Permit
___ ETA
___ TA

3. Date:
Sept 27, 1991

4. ICC Operating Authority No.:
MC - 112713

5. Applicant Name: (Enter exactly as it appears on ICC Certificate or Permit)
YELLOW FREIGHT SYSTEM, INC.

6. Address (Enter exactly as it appears on ICC Certificate or Permit)
10990 ROE AVE.
City: OVERLAND PARK
State/Province: KANSAS
Country: JOHNSON
Zip/Postal Code: 66207
Telephone Number: (913) 344-3048

7. Mailing Address: (Complete only if address is different from No. 4)
City: State/Province:
Country: Zip/Postal:
Telephone Number:

8. Applicant's representative to whom inquiries are to be directed: (Name & Title)
J.S. Upton, Licensing Supervisor

CAB CARD IDENTIFICATION STAMPS

Valid cab card identification stamps are required for the vehicles which you intend to operate within the borders of the State of Michigan. The operations recognized by the Interstate Commerce Commission, the operation of your vehicles is subject to the authority issued to you by the Interstate Commerce Commission. An applicant shall not knowingly permit any other person or organization to use the identification stamps issued or assigned under this application.

9. State law provides that the stamp fee levied on each interstate or foreign motor carrier vehicle licensed in another state or province of Canada, be equal to the annual fee under PL 89-170 charged to a Michigan licensed motor carrier in that state or province. See listing on the attached fee schedule for the fee charged to the state/province in which your company is based and enter below:

a. State or Province which is your base of operations: Kansas.
b. Number of Stamps Requested: 3785
c. Total Stamp Fees*: $37,850.00

*Refer to the attached Cab Card Stamp Fee Chart listing.

Under penalty for false statement, I certify that this application is correct, and that I am authorized to file this document. (Federal penalties, maximum of $10,000 or imprisonment for 5 years, or both, 18 U.S.C. 1001: State penalties as prescribed by law.)

Applicant or Authorized Agent Signature: Title:

/s/
J.S. Upton Licensing Supervisor

(Have you attached your payment?)

Instructions:

1. **New applicant and ICC sub registrations**- For a new application or an ICC sub registration you must file Form A in duplicate. The filing fee for a new application is $25. The filing fee for a sub registration is $10. ICC exempt applicants must file Form A-1 in duplicate. The filing fee for an exempt application is $25.

2. **Cab Cards** - ICC regulated carriers, place the identification stamp on Form D, Uniform Identification Cab Card, available from NARUC, P.O. Box 684, Washington DC 20044. Exempt carriers may place the identification stamp on Form D-1, Uniform Identification Cab Card, available from NARUC.

3. **Expiration** - Cab card stamps are issued effective February 1 of the year for which they are issued and expire on January 31 in the succeeding calendar year.

4. **Cab card stamp fees** - The cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations. Please refer to the accompanying chart to determine the fees appropriate to your fleet. If your company is registered in a state or province which does not require the payment of a cab card stamp fee, you should still complete the form and order the appropriate number of cab card stamps. If the carrier address has changed, the address must be changed at the ICC and a new certificate or permit issued by the ICC and filed with the State of Michigan.

5. **Insurance** – The State of Michigan does not require interstate or exempt carriers to file a current insurance certificate.

6. **Return mailing address** - If stamps are to be mailed to an address other than listed on line 4 of this application, please enter the mailing address on line 5.

7. **Payment of fees** - Make your check or money order payable to the State of Michigan. Funds must be in U.S. dollars. Payment of fees to accompany this application.

8. **Mailing Address** -

   MICHIGAN DEPARTMENT OF COMMERCE
   PUBLIC SERVICE COMMISSION
   6545 MERCANTILE WAY
   P.O. BOX 30221
   LANSING, MICHIGAN 48909-7504

9. Stamp orders are returned with another Interstate Cab Card Stamp Application for possible use during the time period to add additional vehicles to your fleet. Do not use that application for the following year because the stamp fees are subject to change annually. Stamp purchasers will automatically be mailed next years application sufficiently in advance of the due date.

10. **Questions** – Please call (517) 334-6389.

CAB CARD STAMP FEES

Michigan has changed the basis for ordering cab card stamps from one based on the states or provinces the vehicles in your fleet are registered in, to one based on the company's base of operations shown on the ICC certificate or permit granting the carrier authority. This change should reduce the complexity of ordering cab card stamps. Vehicles requiring a MPSC decal do not need a bingo stamp. Please order MPSC decals on a Michigan equipment list. Do not use Form B to order decals.

$0.00 (Purple)	$10.00 (Orange)
Alaska	Alabama
Alberta	Arkansas
Arizona	British Columbia
California	Colorado
Delaware	Connecticut
District of Columbia	Georgia
Florida	Iowa
Hawaii	Kansas
Idaho	Kentucky
Illinois	Louisiana
Indiana	Maine
Manitoba	Massachusetts
Maryland	Mississippi
Minnesota	Montana
Missouri	New Brunswick
Nebraska	Newfoundland
Nevada	New Hampshire
New Jersey	New Mexico
North Carolina	New York
Nova Scotia	North Dakota
Ontario	Ohio
Oregon	Oklahoma
Pennsylvania	Prince Edward Island
Quebec	Rhode Island
Saskatchewan	South Carolina
Texas	South Dakota
Vermont	Tennessee

Wyoming	Utah
	Virginia
	Washington
	West Virginia
	Wisconsin

Vehicles based in Michigan are required to have a $100 MPSC decal only, except for household carriers which are required to have a $50 MPSC decal only.

If you have any questions or need any forms please contact the MPSC at (517) 334-6389.

Supreme Court, U.S.
FILED
SEP 24 2001
OFFICE OF THE CLERK

No. 01-270

IN THE

Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, AND JOHN L. O'DONNELL,
Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Petitioner Yellow Freight System, Inc. is a wholly owned subsidiary of Yellow Corporation, a publicly held company.

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REPLY BRIEF FOR PETITIONER

The opposition of Respondents State of Michigan, *et al.* virtually concedes that the Michigan Supreme Court's opinion below is in error and offers no reason why this court should not resolve the clear conflict between this erroneous opinion and the contrary opinions of the D.C. Circuit [1] and the Interstate Commerce Commission.[2] Where the State of Michigan itself cannot defend the reasoning of its own supreme court, there can be little doubt that this Court should act immediately to eliminate the disruption to federal transportation law which this conflicting state supreme court decision has created.

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[1] *National Association of Regulatory Utility Commissioners v ICC*, 41 F3d 721, 309 U.S. App. D.C. 325 (D.C. Cir. 1994)

[2] *Single State Insurance Registration*, 9 ICC 2d 610 (1993)

The need for certiorari is not negated by the suggestion which occupies almost the entirety of Respondents' opposition that an alternative argument not even mentioned in the Michigan Supreme Court opinion could justify the result of that opinion. Setting aside the substantive deficiencies of this nonmentioned argument, the issue for this Court on certiorari is whether the Michigan Supreme Court opinion expressly challenging the contrary opinions of the D.C. Circuit and the ICC creates an important conflict in the interpretation of federal law which this court should resolve. Respondents' opposition confirms the need for certiorari by highlighting the presence of similar legal circumstances and past legal challenges involving states other than Michigan (Opp. 3, 16, 20b-21b) and recognizing that the Michigan Supreme Court itself stated its explicit disagreement with the prior decisional law created by the D.C. Circuit and the ICC. (Opp. 7).

The argument to which virtually the entirety of Respondents' opposition is dedicated is a claim that Michigan could be found to have been collecting or charging a $10 fee for Illinois plated vehicles on November 15, 1991 within the meaning of the SSRS statute because it had announced prior to that date that it intended to impose such a fee beginning February 1, 1992 [3] Respondents recognize that although the Michigan Supreme Court opinion "noted this fact, it did not figure in its disposition of the case." (Opp. 9). They argue

[3] Michigan made this change by altering its "methodology for determining reciprocity". Opp. 11. The specific alteration involved applying reciprocity exemptions based on the state in which the motor carrier maintained its principal place of business rather than the state in which the vehicles themselves were commercially plated. This change had the effect of eliminating reciprocity fee exemptions for all vehicles commercially plated in fee-exempt states if the owners of such vehicles maintained their principal places of business in non fee-exempt states. The fee for such vehicles was zero for operations on November 15, 1991, but increased to $10 beginning in February 1992.

nevertheless that the Michigan Supreme Court "reached the proper result in this case for reasons other than stated in its opinion." (Opp. 1).

Nowhere in their opposition do Respondents offer any argument as to why the presence of an alternative argument not adopted or even discussed by the Michigan Supreme Court serves to eliminate the clearly stated conflict between that court's opinion and the opinion of the D.C. Circuit. Indeed, the Michigan Supreme Court opinion specifically stated that it did not agree with the D.C. Circuit opinion. (Pet. App. 6a-7a). Respondents' argument that there is not a "square conflict" between the D.C. Circuit opinion and the Michigan Supreme Court opinion is nothing more than a claim that Respondents' alternative argument would have avoided the conflict with the D.C. Circuit. (Opp. 10).

The Michigan Supreme Court opinion, however, does not adopt Respondents' view that a $10 per vehicle fee was being charged to carriers in Petitioner's situation in accordance with reciprocity agreements in force on November 15, 1991. The Michigan Supreme Court, rather, stated specifically that such fees were being "*waived* * * * under a reciprocity agreement" (emphasis added) but that such waivers were legally irrelevant. (Pet. App. 10a-11a). Respondents' arguments that Michigan's fees are based on effective reciprocity agreements so as to comply with the ICC and D.C. Circuit rulings fly in the face of specific statements to the contrary in the Michigan Supreme Court opinion.

Virtually nothing in Respondents' opposition argues that the Michigan Supreme Court opinion is sustainable under its own logic. The closest equivalent to an argument by Respondents in support of the Michigan Supreme Court opinion itself is their reference to the court's quotation of the statutory requirement at 49 U.S.C. §11504(c)(2)(B)(iv)(III) that the ICC shall establish a "fee system". (Pet. App. 9a). Respondents claim that this quote supports the court's

statement that the charging or non charging of a fee to a particular carrier was not relevant to determining compliance with the SSRS statute.[4] Respondents give no indication, however, of why the state's system of reciprocity arrangements in place on November 15, 1991 would not constitute part of the state's fee system, as noted in the dissenting opinion of Justice Kelly (Pet. App. 13a) and argued to this Court by Petitioner. (Pet. 22). Respondents otherwise offer nothing by way of statutory interpretation, textual analysis, legislative history, or logical argument to support the legal position advanced by the Michigan Supreme Court opinion itself.[5] Their surprising determination to devote virtually their entire opposition to theories not adopted by the Michigan Supreme Court speaks volumes concerning the Respondents' own view of the validity of that opinion.

Information presented in Respondents' opposition actually underscores the broad significance of the legal issue in conflict. Respondents point out that immediately following the issuance of the ICC decision setting rules for the SSRS in 1993, a number of states began attempting to modify or

[4] Respondents cite a decision of the Michigan Court of Claims in *Schneider National Carriers, Inc., et al v State of Michigan* in support of their position. (Opp. 14-15, 7b-18b). That opinion was reversed by the Michigan Court of Appeals in *Schneider National Carriers, Inc. v Michigan*, No. 208346 (Mich. Ct. App. May 14, 1999) (unpublished). Following application for leave to appeal to the Michigan Supreme Court, the *Schneider* case has been returned to the Michigan Court of Appeals for further proceedings based on the Michigan Supreme Court opinion which is the subject of this petition.

[5] Respondents are incorrect in describing the Michigan Supreme Court's holding as to the fee charged or collected as "a matter of state law". (Opp. 8). The Michigan Supreme Court opinion stated clearly that the issue before it was "the interpretation of a federal statute". (Pet. App. 8a) Such a statement is in accordance with the well settled doctrine that the meaning of words in a federal statute is a question of federal law. *Western Airlines, Inc. v Board of Equalization*, 480 U.S. 123, 129 (1987).

disregard their reciprocity agreements or raise fees beyond the levels they had charged based on their reciprocity agreements under the previous registration system. (Opp. 16). As Respondents also note, *amicus* ATA was forced to file a supplementary petition with the ICC for a more definitive ruling to emphasize that states could not manipulate the details of their reciprocity agreements to increase fees above the levels established by those agreements in effect on November 15, 1991. *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Registration*, 9 ICC 2d 1184, 1194 (1993). Indeed, Respondents' opposition goes so far as to indicate the other states in which reciprocity agreement modifications were an initial or potential problem: Oklahoma, North Carolina, Indiana, Texas, Idaho, California, and Massachusetts. (Opp. 3, 20b-21b).

This information presented by Respondents themselves clearly disproves Respondents' assertion that the issue presented by the Michigan Supreme Court decision is "unique to Michigan". While Michigan's method of changing its reciprocity system to increase fees may be different from the methods of change previously attempted by other states, the underlying principle is the same.[6] Congress intended in all situations to freeze the fee systems created by reciprocity agreements at the levels in effect as of November 15, 1991.

Finally, there is no legal merit to Respondents' alternative argument which was neither adopted nor even discussed by the Michigan Supreme Court opinion. In essence, the alternative argument claims that "the fee * * * collected or

[6] Respondents' assertion that the overall impact of its reciprocity changes was "revenue neutral" is both legally irrelevant and unlikely. Michigan's change in reciprocity systems had the impact of ending exempt fee treatment for a major category of interstate vehicles: those commercially plated in such traditional base states as Illinois and Indiana by carriers headquartered in other states. The impact of such an adjustment on Petitioner and other carriers such as *amici* Schneider National, Inc., and ABF Freight System, Inc. has been substantial and continuing.

charged as of November 15, 1991" is the fee announced for the *following* year rather than the fee actually being collected or charged for operations for the year of the governing statutory date itself. This argument was specifically discussed and rejected by the ICC in *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Registration*, *supra* at 9 ICC 2d 1192, 1195. ("We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year and we so find.") The Michigan Court of Claims and the Michigan Court of Appeals both reached the same result,[7] finding the ICC's interpretation reasonable under the deference standards of *Chevron*.[8] As those courts held, the ICC's choice of the fee actually in force on November 15, 1991 as the "the fee * * * collected or charged" as of that date under SSRS represents a reasonable interpretation of the statute with which any reviewing court should not interfere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] Pet. App. 41a-42a, 26a-29a.

[8] *Chevron USA, Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Supreme Court, U. S.
FILED
JAN - 2 2002
OFFICE OF THE CLERK

(4)

No. 01-270

In the Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

MICHIGAN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 2146, permits States to charge commercial motor carriers operating in interstate commerce "a fee * * * that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999). The question presented in this case is whether the Michigan Supreme Court erred in holding that only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

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In the Supreme Court of the United States

No. 01-270

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

MICHIGAN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Section 4005 of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Pub. L. No. 102-240, 105 Stat. 2146, formerly codified at 49 U.S.C. 11506 (1994), directed the Interstate Commerce Commission (ICC) to amend its regulations to establish a "Single State Registration System" for commercial motor carriers subject to the ICC's jurisdiction. In 1995, Congress abolished the ICC and assigned the ICC's responsibility for administering the Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C.

14504 (Supp. V 1999) (recodification of Section 4005, as amended).

Congress intended that the Single State Registration System would end the "bingo card" regime that had been in effect since the 1960s. Under that earlier system, the ICC authorized each State to charge carriers a registration fee of as much as ten dollars for each vehicle using the State's highways. The State would issue the carrier a registration stamp for each registered vehicle. The carrier would distribute the stamps to its drivers, who displayed them on vehicle-specific cards that could be produced to state inspectors on request. See *National Ass'n of Regulatory Util. Comm'rs (NARUC)* v. *ICC*, 41 F.3d 721, 724 (D.C. Cir. 1994) (discussing bingo card system). As of 1991, 39 States charged registration fees under the bingo card program and those fees totaled approximately $50 million. *Ibid.* (quoting H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991)).

Under the Single State Registration System, by contrast, "a motor carrier is required to register annually with only one State" and "such single State registration shall be deemed to satisfy the registration requirements of all other States." 49 U.S.C. 14504(c)(1)(A) and (C) (Supp. V 1999); see 49 U.S.C. 11506(c)(1)(A) and (C) (1994) (same). The registration State (which generally is required to be the carrier's principal place of business, see 49 C.F.R. 367.3(a)) collects per-vehicle fees from its carriers on behalf of the other States that participate in the Single State Registration System and into which the carrier plans to send its trucks. See 49 U.S.C. 11506(c)(2)(A)(iii) (1994). Trucking companies thus do not have to obtain annual, vehicle-specific registrations from each of the States where their trucks operate. ISTEA also limited the registration fees that

each State could charge. Congress directed the ICC to adopt standards for a fee system that:

> (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.*

49 U.S.C. 11506(c)(2)(B)(iv) (1994) (emphasis added). Only the 39 States that participated in the bingo card system as of January 1, 1991, were eligible to participate in the Single State Registration program. 49 U.S.C. 11506(c)(2)(D) (1994); see 49 U.S.C. 14504(c)(2)(D) (Supp. V 1999) (same).

2. Under the bingo card system, it was common for States to enter into "reciprocity agreements" under which they reduced or eliminated registration fees for each other's motor carriers. See *NARUC* v. *ICC*, 41 F.3d at 725. In the ICC's rulemaking proceedings to implement the Single State Registration System, the question arose whether States could increase their revenues under the new regime by terminating reciprocity agreements that were in effect in 1991. The ICC initially questioned whether it had authority to require the States to preserve their reciprocity agreements. The ICC noted that the agreements had been made voluntarily rather than by federal compulsion and that "it might place a heavy administrative burden on a registration State" if the State had to "collect from different carriers different fees * * * depending on the various reciprocal agreements negotiated by the various States in which each carrier operates." *Single*

State Ins. Registration, No. MC-100 (Sub-No. 6), 1993 WL 17833, at *12 (ICC Jan. 13, 1993); see *Single State Ins. Registration—1993 Rules*, 9 I.C.C.2d 1, 11 (1992). Some commenters, including petitioner, argued in response that the plain language of Section 11506(c)(2)(B)(iv)(III) (1994), italicized above, requires that reciprocity agreements be considered "when determining the fees * * * collected or charged as of November 15, 1991." Pet. App. 52a; see *id.* at 53a.

In its final decision implementing the single-State program, the ICC concluded that its preliminary view was inconsistent with the letter and intent of Section 11506(c)(2)(B)(iv) and that reciprocity arrangements must be considered in order to cap registration fees at their levels as of November 15, 1991. Pet. App. 53a-54a. The ICC observed that if States discontinued their reciprocity arrangements, "per vehicle fees for many carriers [based in those States] could increase greatly, and some States would realize windfalls." *Id.* at 54a. Although reciprocity agreements might make calculation of the applicable fees more cumbersome, the ICC determined that this administrative burden on the registration State was "outweighed by the likely cost to carriers that could result" from terminating the reciprocity agreements. *Ibid.*

NARUC and state regulatory commissions sought review of the ICC's rulemaking decision in the United States Court of Appeals for the District of Columbia Circuit. *NARUC* v. *ICC*, *supra*. They argued in pertinent part that, when Congress referred to "the fee * * * that [a participating] State collected or charged as of November 15, 1991," it was referring to "the standard fee authorized by each participating State's law," rather than any lower amount that the State might actually have been charging or collecting. Br. of State

Pet'rs and Intervenors, *NARUC* v. *ICC*, *supra* (No. 93-1362).

The D.C. Circuit rejected that argument. *NARUC* v. *ICC*, 41 F.3d at 729. It agreed with the ICC that "the plain language of the statute precludes [the States'] interpretation" and "clearly freezes prior state charges" at the levels actually imposed as of November 15, 1991. Alternatively, the court rejected the States' argument that the ICC's interpretation was irrational and not entitled to deference because it would perpetuate the imposition of any fees that may have been charged in violation of state law in 1991. *Ibid.* Section 11506, the court of appeals reasoned, "merely states that the state may not charge *more* than was charged or collected in the past." *Ibid.* Carriers therefore would not be obligated to pay fees that were illegal under state law when imposed and the ICC's reading of Section 11506's fee cap did not produce anomalous results. *Ibid.* No party sought further review of the D.C. Circuit's decision.

3. Petitioner in this case is a major interstate trucking company headquartered in Kansas. Pet. 1; Pet. App. 40a. Some of petitioner's trucks carrying Illinois license plates enter Michigan and are potentially subject to Michigan's fees under the Single State Registration System. See Pet. 3. For calendar years 1990 and 1991, Michigan did not charge petitioner any bingo stamp fees for those trucks that were "base-plated" in Illinois. Pet. App. 39a-40a; Br. in Opp. App. 3b. Michigan did not charge such fees because it believed that Illinois "did not charge Michigan-based carriers a fee." Br. in Opp. App. 3b. Michigan and Illinois did not have a formal reciprocity agreement, however. *Ibid.*

In September 1991, Michigan mailed petitioner a fee assessment for calendar year 1992 in the amount of ten

dollars for each of petitioner's trucks, including the trucks base-plated in Illinois. Pet. App. 40a; Br. in Opp. App. 4b-5b. Michigan levied those fees pursuant to a new state policy under which Michigan afforded reciprocity to the State where a particular carrier had its principal place of business rather than to the State in which a particular truck was base-plated. Pet. App. 40a-41a; Br. in Opp. App. 4b-5b. Because Kansas did not waive fees for Michigan trucks, Michigan assessed its maximum ten-dollar fee on all of petitioner's trucks. Pet. App. 41a; Br. in Opp. App. 5b. Payment on the 1992 assessment was due on January 1, 1992, although petitioner paid in September 1991. Pet. App. 5a, 25a. In later years, Michigan continued to assess a ten-dollar fee on each of petitioner's trucks. *Id.* at 40a.

Petitioner paid Michigan's registration fees under protest and brought suit in the Michigan Court of Claims. Petitioner sought a refund of the fees it paid for calendar year 1994, when the Single State Registration System became effective (see 49 U.S.C. 11506(c)(3) (1994)), and later years. See Pet. 11. The Michigan trial court ruled in favor of petitioner. Pet. App. 39a-42a. It relied on *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993), in which the ICC specifically agreed with petitioner's argument that ISTEA's cap on fees at the level "charged or collected as of November 15, 1991," 49 U.S.C. 11506(c)(2)(B)(iv) (1994), referred to fees charged or collected for calendar year 1991, not fees assessed in advance for 1992. Pet. App. 41a-42a; see 9 I.C.C.2d at 1192, 1195. Deeming the ICC's decision "dispositive," Pet. App. 41a, the court held that Michigan's assessments on petitioner's Illinois trucks for 1994 through 1996 were unlawful under ISTEA because they exceeded the fees Michigan had

charged petitioner for those trucks for calendar year 1991, *id.* at 42a.

The Michigan Court of Appeals affirmed. Pet. App. 23a-35a. In the intermediate court's view, Section 11506(c)(2)(B)(iv) did not unambiguously answer the question of whether a State's billing of 1992 fees before November 15, 1991, should be considered when determining the State's fee-cap under the Single State Registration System. *Id.* at 28a. Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and analogous state court decisions, the Michigan Court of Appeals held, in relevant part, that the ICC's application of the November 15, 1991 deadline to exclude consideration of fees for 1992 was reasonable and entitled to deference. Pet. App. 27a-29a. Relying on the D.C. Circuit's decision in *NARUC* v. *ICC*, *supra*, the court also rejected Michigan's argument that fee reductions that resulted from reciprocity agreements need not be considered when applying the fee cap. Pet. App. 29a.

The Michigan Supreme Court reversed. Unlike the lower state courts, it did not consider the significance of Michigan's change from a base-plate methodology to a place-of-business methodology for calendar year 1992. Instead, the Michigan Supreme Court addressed the more "fundamental" question of "whether Michigan's reciprocity agreements should be considered" at all when determining what fees Michigan "collected or charged as of November 15, 1991." Pet. App. 6a. In the court's view, reciprocity agreements are not relevant because 49 U.S.C. 11506(c)(2)(B)(iv) (1994) unambiguously requires one to "look not at the fees paid by plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991." Pet. App. 9a. The court expressly

rejected the D.C. Circuit's opposite conclusion in *NARUC* v. *ICC*, *supra*. Pet. App. 6a-7a. Because it considered Section 11506 to be clear on its face, moreover, the court refused to afford *Chevron* deference to the ICC's determination that reciprocity agreements in effect in 1991 must be considered when setting fees. *Id.* at 8a-9a. Accordingly, the Michigan Supreme Court held that the fee Michigan "charged or collected as of November 15, 1991" was the maximum fee of ten dollars authorized by Michigan law on that date, without regard to the fees Michigan actually imposed under its reciprocity policy. *Id.* at 10a.

DISCUSSION

The decision of the Michigan Supreme Court is incorrect and conflicts directly with the decision of the District of Columbia Circuit in *NARUC* v. *ICC*, 41 F.3d 721 (1994). The decision below also has considerable importance for the interstate trucking industry. Therefore, the United States suggests that the petition be granted. The question presented by petitioner, however, should be reformulated to focus this Court's review on the precise issue that divides the Michigan Supreme Court and the federal court of appeals.

1. The holding of the Michigan Supreme Court is that 49 U.S.C. 11506(c)(2)(B)(iv) (1994) (and therefore 49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999)) cap a State's fees under the Single State Registration System at the level of the "generic fee" that was authorized under state law as of November 15, 1991. Pet. App. 9a-10a. The D.C. Circuit's decision in *NARUC* v. *ICC*, by contrast, directly rejected the States' argument that Section 11506 froze state charges at the standard fee (not to exceed ten dollars) authorized by state law, rather than at the level actually imposed in 1991.

41 F.3d at 729; see pp. 4-5, *supra*. There is a square conflict between those two decisions, and the D.C. Circuit was correct.

By its plain terms, ISTEA prohibits a State that participates in the Single State Registration System from imposing a fee greater than the fee that the State "collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994); 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V ~~1999~~). Congress did *not* cap fees at the level that States lawfully *could have* collected or charged in 1991. Congress, moreover, intended that substitution of the Single State Registration System for the old bingo card system would "benefit the interstate carriers" (and therefore consumers) by reducing the carriers' costs of complying with state fee requirements. H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991). If a participant in the Single State Registration System could charge *all* carriers the maximum fee (of up to ten dollars) that it lawfully charged any carrier in 1991, then fees could increase greatly under the Single State Registration System and the system might not reduce carriers' overall compliance burden at all. Indeed, comments submitted to the ICC during its rulemaking proceeding suggested that State fees could quadruple—from $50 million to $200 million nationwide—under the "generic fee" approach endorsed by the Michigan Supreme Court. Pet. App. 53a.

If there were textual ambiguity as to whether 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) capped fees at the charge actually imposed in 1991 or the charge that could have been imposed consistent with state law, then the ICC's resolution of this question would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984), and *United States* v. *Mead Corp.*, 121 S. Ct.

2164, 2171 (2001). Congress explicitly directed the ICC to promulgate rules implementing the Single State Registration System, including the statutory fee cap. 49 U.S.C. 11506(c)(1) and (2)(B) (1994). The ICC determined, after notice and comment, that ignoring the States' fee-reduction arrangements when implementing the cap would be inconsistent with Congress's intent to both (1) maintain state revenues at their 1991 levels and (2) lessen the burdens that registration imposed on carriers.[1] Pet. App. 53a-54a. Furthermore, the ICC determined that any administrative benefits the States might realize from having a simplified fee structure "would be outweighed by the likely cost to carriers that could result" from disregarding the reciprocal discounts that were in effect in 1991. *Id.* at 54a. In *NARUC* v. *ICC* the D.C. Circuit upheld the ICC's determinations under the Administrative Procedure Act, see 5 U.S.C. 701-706, and those determinations are "binding in the courts" under basic principles of administrative law. *Mead*, 121 S. Ct. at 2171; see also *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (deference principles "have particular force" in context of contemporaneous statutory construction by officials charged with setting up new administrative regime).[2]

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[1] As the D.C. Circuit explained in *NARUC* v. *ICC*, 41 F.3d at 724, the fee provisions of Section 11506 reflect a legislative compromise. The House would have eliminated the States' power to charge registration fees while giving the States a $50 million grant to offset their revenue loss. The Senate would not have changed the bingo card system at all. The compromise was to cap fees at 1991 levels while reducing the carriers' costs through a streamlined registration system.

[2] In addition to relying on principles of deference to the agency that Congress charged with making legislative rules, see Pet. 22-28, petitioner invokes preclusion principles, suggesting that "as a party in the [ICC's rulemaking] proceeding, the Michigan Public Service Commission arguably is bound by its results," *id.* at 27 n.13; see generally *Yakus* v. *United States*, 321 U.S. 414 (1944); but see *JEM Broadcasting Co.* v. *FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (holding that substantive validity of agency rule, but not alleged procedural defects, may be raised as defense in enforcement action). That issue was not presented to or passed on by the Michigan Supreme Court, and it need not be addressed by this Court.

2. The issue on which the D.C. Circuit and the Michigan Supreme Court disagree is important to the trucking industry, to proper administration of ISTEA, and to interstate commerce. As noted above, rulemaking comments submitted to the ICC indicated that if all 39 States eligible to participate in the Single State Registration System adopted the "generic fee" rule endorsed by the Michigan Supreme Court in this case, then registration fees could have increased by $150 million—enough to outweigh the benefits of eliminating bingo cards. See Pet. App. 53a-54a. The number of vehicles potentially subject to fees under the Single State Registration System has more than doubled since the ICC's rulemaking, and the potential aggregate fee increase therefore has increased proportionately.

Furthermore, although Michigan states (Br. in Opp. 9) that its change from base-plate reciprocity to principal-place-of-business reciprocity as of calendar year 1992 meant only that "some carriers paid more while other carriers paid less," the Michigan Supreme Court's decision would seem prospectively to allow Michigan to charge *all* interstate carriers a fee of ten dollars per vehicle for *all* trucks that enter Michigan. See Pet. App. 9a-11a. Information provided to the Department of Transportation by Michigan in

connection with the preparation of this filing indicates that Michigan presently does not assess any fee on trucks operated by carriers with their principal place of business in one of 20 States, the District of Columbia, or six Canadian Provinces. If Michigan eliminated all of those fee waivers, then the decision below would result in significant fee increases for the trucking industry even if no other State followed Michigan's lead. Such additional charges would be inconsistent with Congress's specific determination, when adopting ISTEA, that any increase in fees above the level prescribed in Section 11506(c)(2)(B)(iv)(III) (1994) would unreasonably burden interstate commerce. See 49 U.S.C. 11506(b) and (c)(2)(C) (1994).[3]

3. Michigan argues that review by this Court is not warranted because "the result in this case would be the same regardless of how the conflict [presented by the petition] is decided." Br. in Opp. 7. Michigan notes that, as of November 15, 1991, it already had abandoned its base-plate approach to reciprocity (under which Illinois-plated trucks were exempt from Michigan's fee), and had adopted the principal-place-of-business reciprocity approach (under which Kansas motor carriers had to pay a ten-dollar fee). Michigan argues that its

[3] The *Procedures Manual for the Single State Standards for Registration of Interstate Motor Carrier Operations Under Section 4005, Title IV* (*Procedures Manual*) (July 1, 1994), which was issued by the National Conference of State Transportation Specialists, sets out rules on which the States that participate in the single-State registration program have agreed. Consistent with the ICC's determination, Section XIII.A. of the *Procedures Manual* provides that "[r]eciprocity agreement(s) in effect as of November 15, 1991 must be considered when determining fees to be charged under [the single-State] program." The *Procedures Manual* does not have the force of law, however.

fees were being "collected or charged" under the latter approach as of November 15, 1991, and thus fees consistent with that approach are permissible under ISTEA. See *id.* at 9-10. Michigan further suggests that its use of a principal-place-of-business approach should be permissible because the change to that approach was "revenue neutral" and was necessary to align Michigan's policies with the Single State Registration System. See *id.* at 9, 11; Br. in Opp. App. 4b-5b.[4]

The United States takes no position on whether Michigan's current fee policy is lawful under ISTEA for reasons other than the one given by the Michigan Supreme Court. If this Court were to reject the Michigan Supreme Court's "generic fee" theory, then Michigan's alternative defenses of its fees could be presented to the Michigan Supreme Court on remand or the parties could ask the Department of Transportation to consider their arguments.[5] The important

[4] Consistent with federal rules, see 49 C.F.R. 367.3(a), Section I.N. of the *Procedures Manual* requires carriers to register in the State where they maintain their principal place of business, so long as that State participates in the Single State Registration System. Section XIII.B. of the *Procedures Manual* encourages the use of a carrier's principal place of business as the basis for reciprocity, by providing that "[a] motor carrier whose principal place of business is located in a state not eligible to participate in this program *shall not* use its designation of a registration state for this program to afford itself any benefits of reciprocity agreements of that registration state."

[5] In October 1998, the State of Michigan and the Michigan Public Service Commission petitioned the Administrator of the Federal Highway Administration to revisit the ICC's holding in *American Trucking Associations—Petition for Declaratory Order —Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993), that Section 11506's fee cap forbids consideration of fees assessed in advance for calendar year 1992. See *id.* at 1192, 1195. In 2000,

point for present purposes is that the Michigan Supreme Court deemed Michigan's reciprocity practices wholly irrelevant to implementation of Section 11506(c)(2)(B)(iv). See Pet. App. 6a. It is that issue—and that error by the State Supreme Court—that warrants review by this Court.

4. Although we suggest that the Court grant review, the petition's formulation of the question presented could complicate unnecessarily the Court's consideration of this case. The question stated by petitioner is

> whether the Michigan Supreme Court erred in disregarding the ICC's determination and ruling that, notwithstanding 49 U.S.C. §11506(c)(2)(B)(iv)(III), States may charge registration fees in excess of those charged and collected under reciprocity arrangements in force as of November 15, 1991.

Pet. i. Petitioner thus would have this Court determine the legal effect of "reciprocity arrangements in force as of November 15, 1991." *Ibid.* The record, however, indicates that Michigan canceled its reciprocity agreements with other States in 1989. Br. in Opp. App. 3b. Information gathered by the Department of Transportation indicates that, thereafter, Michigan's fee-waiver policy was not based on reciprocal waivers by the other State in all instances. Those factual complexities about what "reciprocal arrangements" (if any) were "in force" in Michigan in 1991 need not be brought into this case because they have no bearing on the Michigan Supreme Court's holding that only the State's ten-dollar "generic" fee is relevant to applying the fee-cap provision. Furthermore, and contrary to petitioner's framing of the question, the statutorily mandated inquiry is what fees were "collected or charged as of November 15, 1991," not what arrangements were "in force."

Michigan reformulates the question presented as whether its fee assessments mailed in September 1991 were "collected or charged as of November 15, 1991," even though they were for calendar year 1992. Br. in Opp. i. If the petition were granted, Michigan apparently would have this Court address arguments about its change to principal-place-of-business reciprocity, which the Michigan Supreme Court *did not* consider, rather than the Michigan Supreme Court's straightforward holding that Michigan's reciprocity policy was irrelevant to applying ISTEA's fee cap.

Because of the deficiencies in the questions framed by the parties, and to ensure that this Court can resolve, without unnecessary complexity, the important issue of statutory construction on which the Michigan Supreme Court disagrees with the ICC and the United States Court of Appeals for the District of Columbia Circuit, we suggest that certiorari should be granted on the following question: "Whether the Michigan Supreme Court erred in holding that, under 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999), only a State's

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motor-carrier safety matters were transferred from the Federal Highway Administration to the Federal Motor Carrier Safety Administration, to which the petition was transferred at that time. See Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748; 49 U.S.C. 113 (Supp. V 1999). The Michigan Supreme Court's holding in this case mooted the relief Michigan sought in its petition. Michigan could, however, revive its request if the Michigan Supreme Court's decision were reversed. We also note that Congress has authorized the Secretary of Transportation to adopt new regulations that could modify or terminate the Single State Registration System. 49 U.S.C. 13908 (Supp. V 1999).

'generic' fee is relevant to determining the fee that was 'collected or charged as of November 15, 1991.'"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2002

Supreme Court, U.S.
FILED
SEP 13 2001
CLERK

No. 01-270

In the Supreme Court of the United States

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR, AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, AND JOHN L. O'DONNELL,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., SCHNEIDER NATIONAL, INC., AND ABF FREIGHT SYSTEM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., SCHNEIDER NATIONAL, INC., AND ABF FREIGHT SYSTEM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,300 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA has a strong interest in the question presented in this case, and it actively participated in the administrative rule-making process before the Interstate Commerce Commission ("ICC"). See Pet. App. 46a (ICC's statement that ATA "submitted extensive comments voicing motor carrier concerns").

Schneider National, Inc., and ABF Freight System, Inc. are interstate motor carriers of general commodities operating in interstate commerce in Michigan. Schneider National is the parent company of five subsidiary carriers that pay the Michigan SSRS fee implicated in this case. Between them, Schneider National and ABF Freight System have been forced to pay hundreds of thousands of dollars every year as a result of Michigan's interpretation of the statute at issue. Like

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[1] The parties have consented to the filing of this brief; the written consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

Yellow Freight, Schneider National has been forced to bring an action in Michigan state court to recover registration fees that Michigan has imposed over the contrary determination of the ICC. See *Schneider Nat'l Carriers, Inc.* v. *Michigan*, No. 208346 (Mich. Ct. App. May 14, 1999) (unpublished).

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the Intermodal Surface Transportation Efficiency Act ("ISTEA") in 1991, it specifically directed the Interstate Commerce Commission ("ICC") to prescribe amendments to the existing standards concerning state registration of motor carriers operating in interstate commerce. See 49 U.S.C. 11506(c)(1) (Pet. App. 99a). One of the substantive provisions Congress ordered the ICC to enforce was a restriction on the imposition by any State of a registration fee higher than the fee the State had "collected or charged" as of November 15, 1991. See 49 U.S.C. 11506(c)(2)(B)(iv)(III) (Pet. App. 101a).

Following an extensive period of notice and comment, the ICC issued regulations and other interpretations of the statute. See *Single State Insurance Regulation*, 9 ICC 2d 610 (1993) (Pet. App. 43a-96a). One of these interpretations concerned the effect of reciprocity agreements between States. Agreeing with comments submitted by *amicus* ATA and other motor carrier interests, the ICC determined that States are not permitted to circumvent the congressional freeze on registration fees by rescinding or otherwise altering reciprocity agreements that had been in effect as of November 15, 1991. See Pet. App. 52a-54a. The ICC understood that this result was "required by § 11506(c)(2)(B)(iv)" and was also supported by its practical experience in regulating interstate commerce. Pet. App. 54a.

Several States challenged the ICC's conclusions regarding reciprocity agreements, but a unanimous panel of the D.C. Circuit sustained the ICC's interpretation of the statute. See

National Ass'n of Reg. Util. Comm'rs v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994) ("*NARUC*"). The D.C. Circuit concluded that "the Commission was correct" in basing its interpretation on "the plain language of the statute." *Id.* at 729.

In the decision below, the Michigan Supreme Court accorded absolutely no deference to the ICC's interpretation of the ISTEA, and it expressly disagreed with the D.C. Circuit's holding in *NARUC*. That decision warrants this Court's review, for several reasons. First, the Michigan Supreme Court's decision sharply conflicts with the D.C. Circuit on an important question of federal law. Second, the decision below is contrary to this Court's precedents concerning the deference that should have been afforded the ICC's reasoned interpretation of the statute Congress charged it to administer. Third, review is particularly appropriate here because the Michigan Supreme Court's decision upsets basic notions of federalism by allowing the State of Michigan to thumb its nose at the ICC and the federal appellate court specializing in administrative law by relitigating the issues involved in *NARUC* in its home forum. Finally, the Michigan Supreme Court's ruling — if allowed to stand — would permit the States to impose enormous burdens on interstate motor carriers and would unravel the balance Congress established for state regulation of interstate commerce under the ISTEA.

ARGUMENT

1. Supreme Court Rule 10(b) specifies that a writ of certiorari may be called for when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of * * * a United States court of appeals." That circumstance is undeniably present here.

There can be no doubt that the Michigan Supreme Court's decision is in direct conflict with the prior decision of the D.C. Circuit; the court admitted the conflict and understood that it

was addressing exactly the same question resolved by the D.C. Circuit in *NARUC*. See Pet. App. 6a-7a. After noting the D.C. Circuit's analysis and conclusion, however, the Michigan Supreme Court dismissed the case entirely with the cavalier observation that it was "not bound to follow that decision." Pet. App. 7a. This Court has routinely granted certiorari under these conditions. See, *e.g.*, *United States* v. *Romani*, 523 U.S. 517, 521 (1998); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985); *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947).

Nor should there be any doubt that the acknowledged conflict involves an important issue of federal law. As the Michigan Supreme Court put it, the issue is the interpretation of a federal statute and the deference due a federal agency's construction of the statute." Pet. App. 8a. And the importance of this issue has been underscored by Congress itself. As described more fully below (at pages 11-12), both Congress and the ICC have determined that allowing states to evade the congressional freeze on registration fees would impose a serious burden on interstate commerce. Moreover, the failure of the Michigan Supreme Court to provide *any* deference to the federal agency charged by Congress with administering the ISTEA and the federal court charged by Congress with deciding most questions of federal administrative law implicates serious questions of federalism. See pages 5-9, *infra*. The fact that the Michigan Supreme Court essentially invalidated a duly promulgated regulation of a federal agency supplies a powerful reason for granting review; this Court has not hesitated to do so in similar circumstances. See, *e.g.*, *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986); *Board of Governors of the Fed. Reserve Sys.* v. *Investment Co. Inst.*, 450 U.S. 46 (1981); *Batteron* v. *Francis*, 432 U.S. 416 (1977).

In sum, this case presents the exact scenario envisioned under Rule 10(b). Further review is therefore warranted.

2. The Michigan Supreme Court's lack of deference to the considered judgment of the ICC is striking, and it is impossible to reconcile with this Court's precedents. The court's refusal to accord the ICC's interpretation of the ISTEA the deference to which it was entitled provides another reason in favor of further review in this case.

This Court established the now-familiar rules of judicial deference to administrative pronouncements in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Under those rules, judicial deference to an administrative construction of a statute is at its zenith when — as here — Congress has directed an agency to promulgate rules or standards concerning a statute it has been charged to administer:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843-844.

Just last Term, this Court reaffirmed the *Chevron* framework, explaining that administrative rulings may encounter "a spectrum of judicial responses, from great respect at one end to near indifference at the other." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) (citations omitted). After reiterating the extensive deference to be accorded an agency when Congress has explicitly entrusted interpretation of a statute to the agency (see *id.* at 2171), the Court pointed to another factor that will trigger extraordinary deference:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

Id. at 2172. Thus, under this Court's precedents, administrative interpretations of a statute are subject to maximal judicial deference when (1) Congress has explicitly entrusted interpretation of the statute to the agency, and (2) the agency has engaged in formal administrative procedures before arriving at its interpretation.

The ICC's interpretation of the ISTEA in this case satisfies both of those criteria. First, Congress specifically directed the ICC to prescribe standards under which motor carriers would be required to register annually with only one State and such single State registration would be deemed to satisfy the registration standards of all other States. See 49 U.S.C. 11506(c)(1) (Pet. App. 99a). It further specified that the ICC's standards "shall establish a fee system for the filing of proof of insurance [that] * * * will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (Pet. App. 101a). Second, the ICC arrived at its interpretation of the ISTEA only following an extensive notice and comment period. See Pet. App. 83a-84a (listing commentors to the ICC's Notice of Proposed Rulemaking, including *amicus* ATA and other carrier organizations, 30 States and State organizations, seven insurers and insurer groups, two shipper groups, the U.S. Department of Transportation, and two consulting firms). Only after this formal notice and comment procedure did the ICC conclude that both "the letter of the law" and "the intent of the law" compel the conclusion that "participating States must consider

fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991[.]" Pet. App. 53a, 54a.

In this case, however, the ICC's interpretation of the ISTEA was subject to even further administrative review. After certain States ignored the ICC's final ruling, *amicus* ATA was forced to bring a petition for a declaratory order before the ICC. See *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Registration*, 9 ICC 2d 1184 (1993). In that proceeding, the ICC once again reviewed its determination, and it decided to "reaffirm" its "prior conclusion" that "[t]he language of the statute is clear": "it is inconsistent with the statute for a State to renounce or modify a reciprocity agreement so as to alter any fee charged or collected as of November 15, 1991, under the predecessor registration system." *Id.* at 1194.

As a result of these factors, the ICC's interpretation of the ISTEA in this case must be afforded extraordinary judicial deference; it is subject to reversal by a reviewing court only if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; accord *Mead Corp.*, 121 S. Ct. at 2171.

In its decision below, the Michigan Supreme Court avowed adherence to the *Chevron* framework, stating that it would "apply the rules of construction set out by the federal judiciary." Pet. App. 8a (citing *Chevron*). The court began, appropriately enough, with its statutory analysis. It admitted that vehicle registration fees were "not 'charged or collected'" whenever Michigan waived the fee by entering into a reciprocity agreement with another State. Pet. App. 10a. But it nevertheless reasoned that "voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991."

Ibid. (emphasis in original). Asserting that the "clear focus" of the statute is on this so-called "generic" fee — a term nowhere mentioned in the statute — the court concluded that the ICC had "added a concept not within the express language of the statute. It added consideration of voluntary agreements between the states to waive or reduce the fees imposed." *Id.* at 10a-11a.

Having divined that Congress's use of the term "fee * * * collected or charged" referred to so-called "generic" fees and could not conceivably have encompassed fees actually charged in accordance with the dozens of reciprocity agreements in existence at the time, the Michigan Supreme Court accorded the ICC's interpretation ***no deference at all*** on the ground that the court's interpretation was the ***only*** one that comported with the "plain meaning of the terms of the ISTEA." Pet. App. 9a. The Michigan Supreme Court was not shaken in its steadfast refusal to admit the possibility of statutory ambiguity by (1) the extensive notice and comment procedures followed by the ICC before arriving at its interpretation; (2) the fact that a unanimous panel of the D.C. Circuit had concluded in *NARUC* that the ICC's reading was the only interpretation consistent with "the plain meaning of the statute" (41 F.3d at 729);[2] (3) the conclusion by two dissenters on the Michigan Supreme Court that the ISTEA was — at a minimum — ambiguous (see Pet. App. 12a, 17a-18a); or (4) the conclusion of both lower courts

[2] The Michigan Supreme Court understood that "a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes." Pet. App. 7a n.10. It made clear, however, that this Court was the only federal court to which it would actually accord any real consideration. See *ibid.* ("where there is no United States Supreme Court decision upon the interpretation in question, the lower federal courts' decisions, while entitled to respectful consideration, are not binding upon this Court"). On that basis, it felt comfortable disregarding the considered judgment of the unanimous D.C. Circuit panel.

in Michigan that the ISTEA was — at a minimum — ambiguous (see Pet. App. 28a, 42a).

The refusal by the Michigan Supreme Court to provide any deference whatsoever to the ICC's interpretation of the ISTEA under the circumstances of this case cannot be reconciled with this Court's precedents. Under *Chevron*, a court may not simply assume that any statutory interpretation with which it disagrees in any respect is "arbitrary, capricious, or manifestly contrary to the statute" (467 U.S. at 844). Yet that is precisely what happened here: the Michigan Supreme Court adopted a strained and idiosyncratic reading of the ISTEA in the face of an expert agency's contrary interpretation that enjoys the independent concurrence of a unanimous panel of D.C Circuit judges and several Michigan state court judges. This conflict between the decision below and this Court's teachings on deference to administrative rulings provides another reason why review is warranted here.

3. The failure of the Michigan Supreme Court to accord the ICC's interpretation of the ISTEA the deference to which it was entitled is particularly pernicious under the facts of this case. The State of Michigan has had no fewer than six chances to challenge Congress's stated intent of freezing registration fees as of November 15, 1991. It is only the Michigan Supreme Court's utter refusal to show any deference or comity to either the ICC or the D.C. Circuit that has permitted Michigan to succeed on its sixth attempt.

Michigan first attempted to circumvent the rate-freezing provision of the ISTEA when it participated as a commentor in the initial notice and comment proceedings before the ICC. See Pet. App. 83a (listing Michigan Public Service Commission as a Commentor). Michigan's second attempt also took place before the ICC, during the proceeding initiated by ATA to obtain a declaratory order. During that proceeding, Michigan

was represented by an umbrella organization, the National Association of Regulatory Utility Commissioners. See 9 ICC 2d at 1197.

Having failed twice before the ICC, Michigan (again acting through NARUC) challenged the ICC's conclusions before the D.C. Circuit, the federal court charged by Congress with reviewing most issues of administrative law. As previously noted, a unanimous panel of the D.C. Circuit wholly endorsed the ICC's interpretation of the ISTEA, finding that "the plain language of the statute precludes [Michigan's] interpretation." *NARUC*, 41 F.3d at 729.

After taking this third strike, Michigan moved the proceedings to its home stadium. Ignoring the considered judgment of the ICC and the D.C. Circuit, Michigan violated the registration-fee-freezing provision of the ISTEA and forced the petitioner in this case to initiate a proceeding in Michigan state court. But Michigan was unsuccessful in its fourth and fifth attempts as well — the Michigan Court of Claims and the Michigan Court of Appeals both understood that deference was due to the federal agency charged by Congress with administering the ISTEA. See Pet. App. 28a, 42a.

This procedural history makes clear that it is only by taking six bites at the apple that Michigan was able to circumvent the fee-freezing provision in the ISTEA. It is equally clear that Michigan was able to achieve that result only when the Michigan Supreme Court refused to accord any respect to the interpretation of the ISTEA by the agency Congress had charged with its administration or the interpretation by the court Congress had created to specialize in administrative law issues.

By allowing Michigan to prevail on its sixth bite at the apple, the decision below fosters disrespect for the federal bodies Congress has designated to resolve administrative law issues within the federal system, and it encourages States to

circumvent federal decisions by litigating in their home courts. For that reason as well, review is warranted here.

4. Finally, the Michigan Supreme Court's decision in this case has had far more than a theoretical adverse impact. It has already placed a substantial burden on interstate commerce, and the logic of the decision threatens to wreak havoc on the interstate registration system.

Congress had a good reason for imposing the registration-fee-freezing provision in the ISTEA. The provision reflected the balance of interstate motor carrier and state interests as Congress modified the prior "bingo card" system to provide greater administrative convenience while at the same time protecting against a diminution in state revenues. Congress understood, however, that allowing States to *increase* revenues over prior levels would result in a burden on interstate commerce. The ISTEA contains a declaration to that exact effect. See 49 U.S.C. 11506(c)(2)(C) (Pet. App. 101a); see also Pet. App. 53a-54a (ICC's determination that Congress's intent was "that the flow of revenue for the States be maintained while the burden of the system for carriers be reduced").

The agency charged with administering the ISTEA also understood the practical problems that would be posed by States circumventing the fee-freezing provision. Thus, the ICC — after receiving extensive comments on this precise issue through the established administrative notice and comment procedures — concluded that, were States permitted to rescind reciprocity agreements, "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls." Pet. App. 54a. While it is understandable that the Michigan Supreme Court might want Michigan to realize a windfall at the expense of interstate motor carriers, that factor cannot trump the expert judgment of the agency charged with administering the ISTEA that allowing States to rescind

reciprocity agreements would burden interstate commerce in a manner that Congress intended to prohibit.

Michigan has now avoided the effects of the ISTEA fee-freezing provision for several years. As a result of the decision below, *amici* Schneider National and ABF Freight System have been forced to pay in excess of $400,000 over the last three years alone. Those are the costs imposed on only two companies as a result of one state making a modification to its reciprocity agreements.

But there is every reason to believe that the actual and potential harm engendered by the decision below will be orders of magnitude more severe than the burden borne by the *amici* here. The effect of the Michigan Supreme Court's decision has already been felt by numerous other carriers. Moreover, under the logic of the decision below, every State would be entitled to rescind every one of its reciprocity agreements, and then defend that decision in its home forum in order to circumvent the fee-freezing provisions of the ISTEA. Citing one of the comments during the rule-making proceeding, the ICC predicted a worst-case scenario in which States permitted to eliminate their reciprocity agreements could ***quadruple*** the annual financial burden on interstate motor carriers from $50 million to $200 million. See Pet. App. 53a. In the aggregate, these effects of the decision below will place a crushing burden on interstate commerce — a result that Congress expressly forbade. See 49 U.S.C. 11506(c)(2)(C) (Pet. App. 101a). For this reason as well, this Court's review is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2001

Supreme Court U.S.
FILED
APR 5 2002
OFFICE OF THE CLERK

No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,

Petitioner,

v.

MICHIGAN, ET AL.,

Respondents.

On Writ of Certiorari to the Michigan Supreme Court

JOINT APPENDIX

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CERTIORARI GRANTED JANUARY 22, 2002

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RELEVANT DOCKET ENTRIES IN THE MICHIGAN COURT OF CLAIMS, No. 95-15706-CM

No.	Date	General Description
1	03/27/1995	Complaint
31	10/10/1995	Defendants' Motion for Summary Disposition with accompanying Affidavit of Thomas R. Lonergan
35	10/25/1995	Plaintiff's Motion for Summary Disposition
38	10/25/1995	Brief in Support of Plaintiff's Motion for Summary Disposition
39	10/25/1995	Affidavit of Joe McDade in Support of Plaintiff's Motion for Summary Disposition
42	11/08/1995	Defendants' Response to Plaintiff's Motion for Summary Disposition
43	11/08/1995	Plaintiff's Response to Defendants' Motion for Summary Disposition
44	11/08/1995	Brief in Opposition to Defendants' Motion for Summary Disposition
51	01/12/1996	Supplemental Affidavit of Joe McDade in Support of Plaintiff's Motion for Summary Disposition

No.	Date	General Description
53	03/14/1996	Opinion and Order
67	04/17/1996	Order Staying Proceedings to Enforce Orders or Judgment
68	04/17/1996	Judgment
69	04/29/1996	Notice of Appeal

RELEVANT DOCKET ENTRIES IN THE MICHIGAN COURT OF APPEALS, No. 194703-Z

No.	Date	General Description
14	09/04/1996	Appellant's Brief
21	11/05/1996	Appellee's Brief
35	08/14/1998	Opinion of the Court
36	08/14/1998	Opinion Concurring in Part and Dissenting in Part

RELEVANT DOCKET ENTRIES IN THE MICHIGAN SUPREME COURT, No. 113656

No.	Date	General Description
1	12/09/1998	Application for Leave to Appeal
2	01/05/1999	Brief in Opposition for Leave to Appeal
5	04/19/2000	Leave to Appeal Granted
6	06/14/2000	Appellant's Brief and Appendix
7	07/20/2000	Appellee's Brief and Appendix
9	05/15/2001	Opinion of the Court
10	06/06/2001	Order of the Court

AFFIDAVIT OF THOMAS R. LONERGAN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

I, Thomas R. Lonergan, having been duly sworn and deposes state as follows:

1. I am presently and was at all times pertinent to the above action, employed by the Michigan Public Service Commission in the capacity as Director of the Motor Carrier Regulation Division.

2. I have personally reviewed the Plaintiff's Complaint filed in the above action and am familiar with the contents of same.

3. Contrary to the factual allegations contained in Plaintiff's Complaint the following is a true and accurate description of the events which are the subject of the Plaintiff's Complaint:

a. Prior to 1988 the Michigan Public Service Commission had reciprocity agreements with several states and provinces pertaining to fees for trucks in interstate commerce.

b. 347 Public Act 1988 amended the Motor Carrier Act and established a new requirement that the Michigan Public Service Commission begin charging regulatory fees for vehicles of interstate, foreign and interstate exempt motor carriers operated in Michigan.

c. 347 Public Act 1988 was amended by 221 Public Act 1989.

d. Until that time, the State of Michigan had not issued cab card stamps to interstate, foreign and interstate exempt motor carriers.

e. Commencing in the fall of 1989 for the calendar year beginning January 1, 1990, the Michigan Public Service Commission began issuing cab card stamps, commonly referred to as "bingo stamps."

f. Under the above act, Michigan was required to charge vehicles from other states $10.00 for the stamp. However, the act permitted the Commission to enter into reciprocal agreements with other states or provinces of Canada that did not charge vehicles licensed in this state regulatory fees, permitting the waiving of $10.00 fees to vehicles licensed in those provinces or states.

g. On August 2, 1989 Chairman William Long sent a letter to all states and provinces canceling any previous reciprocity agreements.

h. For purposes of the new act, the Michigan Public Service Commission Staff contacted other states and provinces to determine if they were in fact charging a fee to Michigan vehicles.

i. The Public Service Commission made a policy decision not to charge a fee to carriers with vehicles registered in states or provinces which did not charge Michigan-based carriers a fee.

j. Under the above-described system, Yellow Freight which had 3,730 vehicles base plated in Illinois and Indiana, was not charged for those cab card stamps as those states did not charge fees for vehicles based in Michigan. Yellow Freight was charged for five vehicles which were base plated in Oklahoma. (Attachment 1). This system was in effect for calendar years 1990 and 1991.

k. After two years of administration of the cab card stamp program using the system of determining fees and reciprocity waiver based on the state of vehicle registration, it

became evident that this system was unduly complex and inefficient to administer. A cab card application could include vehicle registrations in many different states requiring several calculations and the possibility of error in reciprocity waivers. It also became apparent that Michigan was one of very few, and possibly the only, state using this system as opposed to the principal place of business system. Further, work was proceeding on legislation in Washington to mandate a single base state program and this would require a uniform approach by the participating states.

l. The Public Service Commission made a policy decision in 1991 to change to a system utilizing the principal place of business as the basis for fees and reciprocity. This decision was made in early 1991 and the revised renewal applications were mailed to all interstate motor carriers in September of 1991. This clearly pre-dated the effective date for freezing fees and reciprocity, being November 15, 1991.

m. The above changes are reflected in the attached cab stamp application forms. Attachment No. 1 is the renewal for the 1991 cab stamps and indicates in paragraph 8 that the fee schedule is based on the fee charged by the state in which the company's vehicles are commercially base plated. Attachment No. 2 is the renewal form mailed and used in 1991 for the 1992 registration year. This form states that the fee schedule is based on the state or province in which the company is based.

n. Thus, no reciprocity agreements were changed. Rather, for efficiency reasons and to be in compliance with the SSRS the MPSC based reciprocity on the state in which a company was located rather than the states in which the vehicles were base plated.

o. Under the "base plating" system Yellow Freight, with a substantial number of trucks base plated in the states of

Illinois and Indiana, did not pay fees due to reciprocity arrangements with those states.

p. After the system was changed basing reciprocity on a company's principal place of business, Yellow Freight had to pay fees as its principal place of business was in Kansas. Michigan had no fee waiver with the State of Kansas. Other motor carriers would have paid less as a result of the change if they were based in a state with which Michigan had a fee waiver.

q. 49 U.S.C. § 11506 sets forth the fee systems and states in part:

> Will result in a fee for each participating state that is equal to the fee, not to exceed $10.00 per vehicle, that such state collected or charged as of *November 15, 1991*;

Pursuant to the above, it was determined that fees would be based on fees collected and charged as of November 15, 1991.

r. In the instance of Yellow Freight that fee was based on the fees charged and collected as of November 15, 1991. (See Exhibit 2). The application form with payment was received on October 3, 1991 as well as payment in full. This established that the Michigan system in place as of November 15, 1991 was the "principal place of business" system and has been continued each year thereafter.

s. The above method of fee collection was made in good faith with the understanding that same was in accord with the newly enacted SSRS which was to become effective on January 1, 1992.

4. At all times during my contacts with the Plaintiff, if any, I acted in good faith, within the scope of my authority and in my official capacity as a public employee of the State of Michigan and not in my personal capacity.

5. If sworn I can competently testify to the facts set forth in this Affidavit.

Further affiant sayeth not.

/s/ Thomas R. Lonergan, Director
Motor Carrier Regulation Division
Michigan Public Service Commission

Subscribed and sworn to before me this
9th day of October, 1995

/s/ Pamela A. Cabic
Notary Public, Eaton County, Michigan
My Commission Expires: 2/4/98

* * *

[ATTACHMENT NO. 2,
MICHIGAN INTERSTATE CAB CARD STAMP
APPLICATION, 1991 RENEWAL]

* * *

Instructions:

1. New applicant and ICC sub registrations — For a new application or an ICC sub registration you must file Form A in duplicate. The filing fee for a new application is $25. The filing fee for a sub registration is $10. ICC exempt applicants must file Form A-1 in duplicate. The filing fee for an exempt application is $25.

2. Cab Cards — ICC regulated carriers, place the identification stamp on Form D, Uniform Identification Cab Card, available from NARUC, P.O. Box 684, Washington DC 20044. Exempt carriers may place the identification stamp on Form D-1, Uniform Identification Cab Card, available from NARUC.

3. Expiration — Cab card stamps are issued effective February 1 of the year for which they are issued and expire on January 31 in the succeeding calendar year.

4. Cab card stamp fees — The cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations. Please refer to the accompanying chart to determine the fees appropriate to your fleet. If your company is registered in a state or province which does not require the payment of a cab card stamp fee, you should still complete the form and order the appropriate number of cab card stamps. If the carrier address has changed, the

address must be changed at the ICC and a new certificate or permit issued by the ICC and filed with the State of Michigan.

5. Insurance — The State of Michigan **does not** require interstate or exempt carriers to file a current insurance certificate.

6. Return mailing address — If stamps are to be mailed to an address other than listed on line 4 of this application, please enter the mailing address on line 5.

7. Payment of fees — Make your check or money order payable to the State of Michigan. Funds must be in U.S. dollars. Payment of fees to accompany this application.

8. Mailing Address —

MICHIGAN DEPARTMENT OF COMMERCE
PUBLIC SERVICE COMMISSION
6545 MERCANTILE WAY
P.O. BOX 30221
LANSING, MICHIGAN 48909 - 7504

* * *

AFFIDAVIT OF JOE McDADE

STATE OF KANSAS)
) ss
COUNTY OF JOHNSON)

JOE McDADE, being sworn, submits his affidavit in the above matter:

1. My name is Joe McDade. My business address is 10990 Roe Avenue, Overland Park, Kansas 66211. I am employed as Manager of Licensing for Plaintiff Yellow Freight System, Inc. ("Yellow"). I am authorized to submit this statement on behalf of my company in this matter.

2. My duties as Manager of Licensing involve securing compliance and payment by Yellow with the licensing, fee, and vehicle registration requirements of the various states. I have held the position of Manager of Licensing for the past seven years and have been employed by Yellow since 1982. I have day to day familiarity with the contents of this affidavit through my working responsibilities with Yellow.

3. I am the same individual who executed the verification of complaint in this matter on March 16, 1995. It is my understanding that this verification is attached to the complaint as filed with this court. I continue to verify that the facts set forth in the complaint are true and correct to the best of my own personal knowledge.

4. Yellow is a for-hire motor carrier which, as pertinent to this proceeding, performs transportation in interstate and foreign commerce under certificates and permits issued by the Interstate Commerce Commission ("ICC").

5. One of my duties with Yellow has been to direct and coordinate the payment by our company of fees charged to interstate motor carriers by the various states in connection with registration of either ICC operating authorities or proofs of

insurance. Standards for such registration and fees are prescribed by the ICC under a delegation of authority from Congress under 49 U.S.C. § 11506.

6. For years prior to 1994, regulations published by the ICC at 49 C.F.R. 1023 permitted states to charge fees of up to $10.00 per vehicle for each vehicle which an interstate motor carrier intended to operate within a particular state. During this time, the State of Michigan and most other states had procedures in place under which carriers such as Yellow would pay their fees on a calendar year basis by submitting registration forms and payment prior to the beginning of the calendar year in question. In the fall of 1990, for example, the State of Michigan sent us a "1991 Renewal" form for registering our interstate vehicles which served as an application to obtain 1991 "cab card stamps" for those vehicles. Those cab card stamps became effective as of January 1, 1991 and remained valid throughout the calendar year.

7. Attached as Exhibit A to this affidavit is a copy of the form which we received and returned to the Michigan Public Service Commission in connection with registering our interstate vehicles with Michigan for calendar year 1991. As noted on the form, 3,730 of the vehicles which we were registering with Michigan were commercially plated in either Illinois or Indiana. The policy of the State of Michigan at the time we filed this form was that vehicles commercially plated in Illinois or Indiana were not required to pay registration fees to Michigan. It was my understanding that this lack of a fee requirement arose from a reciprocity agreement among these three states. We also elected in that year to register five vehicles with Michigan which were commercially plated in Oklahoma. Michigan required us to pay a fee of $10.00 per vehicle for those five vehicles, apparently because no reciprocity agreement was in effect between Michigan and Oklahoma. We received our 1991 cab card stamps for all of the

vehicles which we registered on this form. Those vehicles were permitted to operate in Michigan throughout 1991 under the cab card stamps which we had obtained from the registration form attached as Exhibit A.

8. In late 1991, Congress enacted legislation which changed the system for state registrations by interstate carriers, to take effect beginning with calendar year 1994. This legislation altered the basic requirements for vehicle registration and directed the ICC to prescribe new standards for such registration. The ICC held proceedings to consider these new standards and issued decisions and specific regulations which established those standards. Notices of these proceedings were published in the Federal Register and all interested parties were afforded an opportunity to file comments. The ICC's decision issuing its final regulation was released on May 18, 1993. *Single State Insurance Registration*, 9 ICC 2d 610 (1993) ("*Single State*"). The ICC also issued a supplemental decision providing additional standards in *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Regulation*, 9 ICC 2d 1184 (1993) ("*American Trucking*"). The ICC's decision in *American Trucking* was announced November 1, 1993, made available in written form on November 18, 1993 and served on November 22, 1993. Yellow was a party submitting comments in both of these proceedings.

9. The dispute with the State of Michigan and its agencies and employees which forms the basis for this proceeding arises from the directives imposed by Congress in the 1991 legislation establishing the maximum fees which could be charged by states for calendar years beginning in 1994. The statutory language directed the ICC to establish a fee system which would "result in a fee for each participating State that is equal to the fee, not to exceed $10.00 per vehicle, that such State collected or charged as of November 15, 1991."

49 U.S.C. § 11506(b)(2)(B)(iv). Yellow interpreted this language as limiting states to charging the fees they actually had assessed for the 1991 registration year, giving effect to any reciprocity agreements which the states may have had in place with respect to that year. The ICC's decision in *Single State* agreed with Yellow concerning giving effect to reciprocity provisions. The decision in *American Trucking* further agreed with Yellow that calendar year 1991 was the appropriate point of reference for determining the fees "charged or collected as of November 15, 1991" within the meaning of the statute.

10. Another change added to the state registration system beginning with calendar year 1994 was the implementation of a system by which carriers would submit their vehicle registrations and fee payments for all states to a single registration state. For Yellow, the appropriate registration state under this system was Kansas. During 1993, Yellow made inquiries with the State of Michigan to confirm that vehicles commercially plated in Illinois could be registered for Michigan operations in 1994 without a fee payment, in the same manner as had been the case for calendar year 1991. We were told, however, that Michigan did not agree with this position and was seeking to assess a full $10.00 per vehicle fee for our Illinois-based vehicles as to which we would have paid no fees for calendar year 1991.

11. On November 9, 1993, we submitted our fee payment to the State of Kansas containing fees for all states, including Michigan. The portion of our fees with respect to Michigan were paid under protest as set forth in my letter on that date to the Kansas Corporation Commission (Appendix B). As I indicated in that letter with respect to a state involving parallel issues, Indiana,[1] our entire line haul fleet at that time was based

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[1] Indiana has subsequently changed its position and now charges no fees for registration of Yellow's vehicles which are commercially

in Illinois. The vehicles in that fleet each were commercially plated in Illinois. None of these vehicles would have been subject to any fees under the fee arrangements which Michigan had followed for calendar year 1991 for vehicles commercially plated in Illinois. The total number of line haul power units commercially plated in Illinois as of January 1, 1994 was 3,759. We elected to register 3,353 vehicles for Michigan operations for calendar year 1994, paying $33,530.00 to the State of Kansas earmarked for this purpose.

12. On receiving our payment under protest with respect to Michigan and the other states indicated in my letter, the state of Kansas advised us that it was remitting the monies in question to the various states and that we should deal directly with those states to pursue our requests for refunds. On January 21, 1994, I submitted a letter request to the Michigan Public Service Commission for refund of the registration fees of $33,530.00 which were paid with respect to Michigan for calendar year 1994. The Michigan Public Service Commission refused to refund such fees.

13. On July 29, 1994, I executed a notice of claim for refund with respect to the 1994 fees for filing with the Michigan Court of Claims. That filing together with an acknowledgment from the court is attached as Exhibit B to the complaint in this matter.

14. With respect to calendar year 1995, Yellow and the State of Michigan continued their respective positions. Yellow's filing with the State of Kansas to register interstate vehicles for calendar 1995 included payments to Michigan of the $10.00 per vehicle fee which Michigan authorities were demanding. For 1995, our entire line haul fleet continued to be commercially plated in Illinois and similarly would have been

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plated in Illinois.

assessed no fees under the system which Michigan had imposed with respect to vehicles for calendar year 1991. As of January 1, 1995, Yellow's line haul power unit fleet consisted of 3,600 vehicles, each of which was commercially plated in Illinois. Yellow elected to register 3,342 vehicles with Michigan, paying $33,420.00 in registration fees earmarked for this purpose to the State of Kansas on October 20, 1994.

15. On December 1, 1994, I executed a notice of claim for refund in the amount of $33,420.00 with respect to vehicles registered for calendar year 1995. That claim was filed in the Court of Claims on December 15, 1994. A copy of that claim together with the court's acknowledgment of receipt is included in Exhibit B to the complaint in this matter.

16. All of Yellow's line haul power units continue to be commercially plated in Illinois. It is anticipated that issues with respect to the fees for these vehicles claimed by Michigan will continue to arise with respect to calendar year 1996 and subsequent years.

VERIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF JOHNSON)

JOE McDADE, being sworn, states under oath that he has read the foregoing Affidavit and that the facts set forth in that Affidavit are true and correct to the best of his knowledge.

/s/ JOE McDADE

Subscribed and sworn to before me
this 23rd day of October, 1995.

/s/ Linda L. Harris, Notary Public
Johnson County, Kansas
My Commission expires: January 12, 1997

* * *

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

[Title omitted in printing]

OPINION AND ORDER

[Filed March 13, 1996]

FACTS

Plaintiff is a commercial hauler operating in interstate commerce throughout the United States. The State of Michigan has assessed a ten dollar ($10) charge, per vehicle, registration fee to Yellow Freight pursuant to 49 U.S.C. § 11506(c). Under this provision, states may assess the fee against interstate motor carriers only if such fee "is equal to the fee, not to exceed $10 per vehicle, that such state collected or charged as of November 15, 1991."

It is undisputed that, prior to the enactment of the above law, individual states were permitted to charge a fee to various carriers operating in interstate commerce. However, the state of Michigan had in place during calendar year 1991 a reciprocity agreement with various neighboring states, including Illinois, that waived imposition of the fee against motor carriers based in Michigan. It is undisputed that no registration fee was charged to Yellow Freight for calendar years 1990 and 1991 because Illinois had agreed to waive the fee for Michigan motor carriers.

In December, 1991, the Intermodal Surface Transportation Efficiency Act went into effect after being signed by the President. Under this new law, each motor carrier would pay all assessed fees through its home state. Each home state was required to assess and collect fees charged by other states on their behalf.

Pursuant to the above, Yellow Freight dutifully paid its registration fees to the State of Kansas, its home state. In addition, it paid a ten dollar ($10) per vehicle fee to the State of Michigan under protest for calendar year 1994. Likewise, fees were paid under protest for 1995 and 1996.

Prior to the end of 1991, Michigan changed the basis for determining reciprocity. Formerly, the state of licensure of the vehicle was used for the decision. For 1992 and beyond the actual home state of the company was used. In this case, Kansas became the state for determination of reciprocity. As such, the fee was collectible since Kansas had no reciprocity with Michigan.

DECISION

Under the single state registration system enacted in 1991, and effective November 15, 1994, individual states could charge a fee, which does not exceed ten dollars ($10) per vehicle, equal of the fee collected or charged to the carrier as of November 15, 1991. In this particular case, there is no dispute that Michigan did not charge any fee to Yellow Freight for calendar year 1991 due to the reciprocity agreement with other states. It is equally clear that a ten dollar ($10) fee was charged to those carriers registered in states that did not waive the fee for Michigan carriers.

Michigan, in anticipation of the new legislation, through the Public Service Commission, changed its method of

determining reciprocity prior to October, 1991. Under its new formula for reciprocity, a carrier's principal place of business would be used to determine reciprocity rather than the state that licensed the trucks owned by the carrier. In this case, Kansas now became the state to be used in determining reciprocity for Yellow Freight in place of Illinois. As the state of Kansas did not waive fees for Michigan vehicles, a ten dollar ($10) fee per truck was charged to Yellow Freight. This fee was properly paid by the Plaintiff on October 3, 1991, for registration in 1992.

The Defendant has taken the position that while it is true that no fee was charged or collected for 1991, there was a fee in place for 1992 that was charged prior to November 15, 1991. Therefore, Michigan was perfectly within its rights in charging the ten dollars ($10) in 1994 and beyond. Plaintiff, relying on the same language of the statute, believes that since no fee was charged in 1991, the fact that a fee for 1992 was put in place should not allow collection of the fee. The issue to be resolved is to determine the correct manner of interpreting this language.

Under the Interstate Commerce Clause, federal law supersedes the authority of individual states to regulate interstate commerce. In this regard, the Interstate Commerce Commission has regulatory authority over the implementation of the various acts of congress controlling the smooth flow of commerce between the states. In interpreting the intent of congress, this Court believes it should give great weight to the interpretation of the law applied to the statute by the agency charged with its enforcement. In this regard, this Court believes that the decision by the ICC in its decision in the *American Trucking* case is dispositive of the issues to be decided here. In *American Trucking*, the issue herein was specifically raised and decided. The commission held that: Yellow has raised the

issue of whether statutory language concerning the "fee charged or collected as of November 15, 1991," relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and so we find.

Based upon this interpretation, this court finds that the fees for 1994 though 1996 were improperly charged and are hereby ordered refunded.

Dated: March 13, 1996

/s/ William E. Collette
Circuit Judge

MICHIGAN COURT OF APPEALS

[Title omitted in printing]

OPINION

Decided Aug. 14, 1998

Before RICHARD ALLEN GRIFFIN, P.J., and McDONALD and O'CONNELL, JJ.

McDONALD, Judge.

Plaintiff, an interstate commercial carrier, brought this action asserting that defendants (the state) had collected registration fees pursuant to M.C.L. § 478.7(4); M.S.A. § 22.565(1)(4) in excess of the amount allowed by federal law, specifically the single-state registration system (SSRS). The Court of Claims, ruling on cross motions for summary disposition, agreed with plaintiff and granted its motion. The court entered judgment in favor of plaintiff for $99,580 plus interest and ordered that the state was barred from further collection of the registration fees until 49 U.S.C. "11506(c)(B)(iv) [sic] is rescinded." In Docket No. 194703, the state appeals this ruling as of right. In Docket No. 195564, plaintiff challenges the Court of Claims' denial of plaintiff's request for attorney fees. We affirm.

I

In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA), P.L. 102-240, which

substantially amended 49 U.S.C. § 11506[1] and directed the Interstate Commerce Commission (ICC) to reform the licensing and registration system existing in the states. The statute mandated the creation of a new system, the SSRS. The statute required the ICC to prescribe amendments of the previously existing standards and set forth certain requirements for the new standards.[2]

The provision at issue, 49 U.S.C. §11506(c)(2)(B)(iv)(III), stated that the amended standards shall establish a fee system that "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991."

The regulations promulgated by the ICC repeated the phrase "collected or charged as of November 15, 1991" without further explanation. See 49 C.F.R. § 1023.4(c)(4)(ii) (1995), later redesignated as 49 C.F.R. § 367.4(c)(4)(ii) (1996).

Because the statute essentially froze the fees a state could collect at the level existing as of November 15, 1991, the fee system in effect in this state at that time is pertinent to understanding the issues raised in this case. For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as "bingo stamps," for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to M.C.L. § 478.7(4); M.S.A. § 22.565(1)(4), the state had reciprocity agreements with certain other states so that each would waive the fees for

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[1] 49 U.S.C. § 11506 was amended and recodified and now appears at 49 U.S.C. § 14504. To avoid confusion, we will refer only to 49 U.S.C. § 11506.

[2] The registration system in effect before and after the ISTEA is explained in detail in *Nat'l Ass'n of Regulatory Utility Comm'rs v. ICC*, 309 U.S. App. D.C. 325, 41 F.3d 721 (1994).

vehicles from the other. The dispute arises in part because the state changed the method it used for determining reciprocity. For 1991, the state used the "base-plating system," which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit using the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business. The revised renewal applications were mailed to all interstate motor carriers in September 1991. Importantly, the 1992 fees to be "collected or charged" by the state were based on a calendar year and therefore were not due and owing until January 1, 1992.

The change in the method of determining reciprocity resulted in a substantial increase in the fees plaintiff owed the state for the 1992 registration year. Under the base-plating system used for 1991, plaintiff paid the state $50 for five vehicles that were "base-plated" in Oklahoma, but paid nothing for 3,730 vehicles "base-plated" in Illinois and Indiana, because those states did not charge fees for vehicles based in Michigan. However, plaintiff's principal place of business is Kansas, which had no fee waiver agreement with Michigan. Therefore, for 1992, plaintiff paid $10 a vehicle, a total of $37,850 under the new system. Plaintiff sent, and the state received, the fees for 1992 before November 15, 1991. Plaintiff voluntarily paid its 1992 fees early in order to prevent any disruption of its trucking activities at the commencement of the January 1, 1992, calendar year.

II

The state argues the Court of Claims erred in determining that the state could not charge plaintiff $10 a vehicle. According to the state, it had "charged or collected" $10 a vehicle as of November 15, 1991. Plaintiff argued, and the

Court of Claims agreed, the statute was properly interpreted to refer to the fees charged or collected for the 1991 registration year. We affirm the Court of Claims' decision with regard to this issue.

The Court of Claims' opinion indicates its decision was based on the ICC's decision in *American Trucking Ass'n — Petition for Declaratory Order — Single State Ins. Registration*, 9 ICC2d 1184 (1993). In *American Trucking*, the ICC discussed various issues that had arisen under the SSRS. The plaintiff sought clarification from the ICC concerning the statutory language. The ICC summarized the issue raised by the plaintiff in the following way:

> Yellow [Freight] raises the issue of whether the statutory language concerning the fee charged on November 15, 1991, relates to fees charged for the 1991 registration year or the 1992 registration year. (Under the "bingo" regulations, carriers filed applications between October 1 and December 31 for stamps or identification numbers for the ensuing year.) Yellow points out that it paid a State zero fees covering 1991 operations and $10 per vehicle fees covering 1992 operations. However, Yellow paid the 1992 fees prior to November 15, 1991. It would have the Commission conclude that the focus of the statute is on the 1991 registration year and that the fee for 1992 is not germane.

The ICC resolved the matter as follows:

> Yellow has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991[,]" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find.

The state argues the court should not have followed *American Trucking* because it does not comport with the unambiguous language of the statute and renders the November 15, 1991, deadline a "nullity." Therefore, the state argues the decision was not entitled to the deference usually afforded an agency's interpretation of a statute that the agency is charged with enforcing.

This Court has recognized that deference should be given to the interpretation of a federal statute by the agency administering it and that following an agency's interpretation promotes uniformity in application by the states. *Gibbs v. General Motors Corp.*, 134 Mich. App. 429, 432, 351 N.W.2d 315 (1984). Where a statute is silent or ambiguous regarding congressional intent, a reviewing court "should defer to a federal agency's construction of the statute unless the agency's interpretation is unreasonable." *Walker [illegible]son & Johnson Vision Products, Inc.*, 217 Mich. App. [illegible], 213, 552 N.W.2d 679 (1996), citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Congress' intent concerning the allowable fee levels is not clear with respect to the pertinent period for fixing the fee levels. The phrase "as of November 15, 1991" denotes a period that ends on the specified date. However, the statute is silent regarding when the period begins. One could argue a state that had charged or collected fees from a carrier in any year before 1991 was entitled to continue to collect the fees under the SSRS. On the other hand, one could conclude, as the ICC did, that the relevant period was the registration year that included November 15, 1991. We do not believe Congress "had an intention on the precise question at issue. . . ." *Id.* at 843, n. 9. Because the statute does not reveal congressional intent, we should defer to the ICC's interpretation unless it is unreasonable. *Walker*, supra.

We conclude that the agency's interpretation of the statute was reasonable. In our opinion, the agency acted reasonably in determining the fees should be fixed at the level in effect for the 1991 registration year, regardless of whether a new basis for determining reciprocity had been announced for 1992 or whether certain carriers had paid fees for 1992 before November 15, 1991.

Plaintiff's voluntary payment of fees not due and owing does not affect our analysis.

The state also contends the Court of Claims' ruling applying the *American Trucking* decision by the ICC "effectively repeals existing reciprocity agreements and/or alters them to reinstate a previous basis for determining fee waivers thereunder[,]" and thereby "contravenes the Tenth Amendment."[3] This argument has no merit. We disagree with the premise of the state's argument, i.e., that the Court of Claims' decision repeals or alters any reciprocity agreements. Any effect on a state's ability to alter its reciprocity agreements is the result of Congress' decision to freeze fees at the level as of November 15, 1991. Congress has the authority to take this action under the Commerce Clause, U.S. Const., Art. I, § 8.

The state argues the language in the *American Trucking* decision by the ICC was not binding on the state because the notice of institution of declaratory action resulting in that decision did not indicate facts specific to Michigan. We disagree. The Court of Claims did not conclude that the ICC decision in *American Trucking* was binding on the state. However, the court could not properly disregard the agency's interpretation of a statute merely because the state did not

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[3] U.S. Const., Am. X states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

participate in the proceeding. The state has not provided, nor are we aware of, any authority holding that an alleged deficiency in the notice of institution of declaratory action affects judicial review of an agency's interpretation of a statute.

The state also suggests that states should not be required to consider reciprocity agreements in determining the amount of fees "charged or collected as of November 15, 1991." In *Single-State Ins. Registration*, 9 ICC2d 610 (1993), the ICC determined that states must consider the reciprocity agreements. The ICC's decision in this regard was upheld in *Nat'l Ass'n of Regulatory Utility Comm'rs v. ICC*, 309 U.S. App. D.C. 325, 41 F.3d 721 (1994). Although that decision is not binding on this Court, we find it persuasive and adopt its ruling with regard to this issue.

III

We also reject the state's argument that governmental immunity, M.C.L. § 691.1407; M.S.A. § 3.996(107), bars plaintiff's action. The wrong alleged by plaintiff does not fall within the definition of a tort. This action to recover fees paid in excess of the amount allowed by federal law is analogous to an action to recover illegal taxes. "The remedy to recover illegal taxes paid is in assumpsit for money had and received." *Service Coal Co. v. Unemployment Compensation Comm.*, 333 Mich. 526, 531, 53 N.W.2d 362 (1952), quoting *Salisbury v. Detroit*, 258 Mich. 235, 241 N.W. 888 (1932). An action in assumpsit for money had and received is not an action in tort. Therefore, governmental immunity from tort liability under M.C.L. § 691.1407; M.S.A. § 3.996(107) does not apply.

IV

The state also contends plaintiff was required to request a declaratory ruling from the PSC as a prerequisite to court review. We disagree. The state relies on both §§ 63 and 64 of

the Administrative Procedures Act, M.C.L. § 24.263; M.S.A. § 3.560(163) and M.C.L. § 24.264; M.S.A. § 3.560(164). However, neither section would support reversing the judgment entered in favor of plaintiff.

Plaintiff's action is not accurately characterized as simply an action for a declaratory judgment available under § 64. Rather, as previously discussed, the action was essentially an action in assumpsit for money had and received. Furthermore, only the validity or applicability of rules that had been formally promulgated as rules may be challenged in actions for declaratory judgments under § 64. See *Jones v. Dep't of Corrections*, 185 Mich. App. 134, 137, 460 N.W.2d 575 (1990). The state has not suggested that the collection of fees was pursuant to a rule that had been formally promulgated under the APA. Because plaintiff's action was not a challenge to the validity or applicability of a formally promulgated rule, § 64 of the APA does not require plaintiff to get a declaratory ruling as a prerequisite to judicial review.

To the extent that the state claims that plaintiff was required to get a declaratory ruling under § 63, we also find that section inapplicable. Section 63 indicates that the agency "may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency." Assuming plaintiff could have requested a declaratory ruling, § 63 does not require plaintiff to do so before seeking judicial review.

V

We next address the relief that the court awarded to plaintiff, specifically, a refund of $99,580, which is the amount collected for 1994, 1995, and 1996. Arguing that a refund is contrary to the United States Supreme Court decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the state requests the remedy be

limited to prospective relief commencing at the time of "any final appellate decision" on the issue.

Contrary to the state's argument, we believe that *McKesson* indicates that a refund is an appropriate remedy in this case. In *McKesson*, the United States Supreme Court considered whether prospective relief was an adequate remedy for wholesale liquor distributors who sought a refund of excess taxes they had paid pursuant to Florida's excise tax scheme. The scheme was found unconstitutional because it discriminated against interstate commerce. In determining the appropriate remedy, the Court concluded that due process required more than prospective relief:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. [*Id.* at 31.]

The state cites *McKesson* for its discussion of the "pass-on" defense to an action for a tax refund. See *McKesson*, supra at 47-48. The state suggests a refund is not necessary if the expense of the unlawfully collected fees was passed on to plaintiff's customers. However, the *McKesson* Court ultimately rejected the defense in that case, *id.* at 48- 49. The state has not cited any authority indicating that the pass-on defense has been adopted in this jurisdiction, and we decline to adopt it in this case.

The state also cites *LCI Int'l Telecommunications Corp. v. Dep't of Commerce*, 227 Mich. App. 196, 574 N.W.2d 710 (1997), as support for its argument that plaintiff should receive

only prospective relief. In *LCI*, this Court determined that the defendants had consistently misinterpreted a statute for over twenty years, resulting in improper assessments against telecommunications carriers. The Court held that its holding should be applied only prospectively, in part because the ruling was not "clearly foreshadowed." In the present case, the result was clearly foreshadowed by the ICC's decisions in *American Trucking* and *Single-State Registration*, which were issued in 1993, less than a year after the ICC adopted the SSRS.

The state also contends that, if this Court does not limit Yellow Freight to prospective relief, it should order a remand to the PSC to allow the state to change the fee schedule to retroactively surcharge carriers who benefitted from the state's misapplication of the SSRS. The state relies on language in *McKesson* suggesting that, as one of the alternatives to providing a refund to the aggrieved distributors in that case, Florida could assess and collect back taxes from the petitioners' competitors. *Id.* at 40. However, the adequacy of any remedy necessarily depends on the basis for relief. In *McKesson*, the petitioners were entitled to relief because a statute imposing an excise tax discriminated in favor of distributors of local products. The remedies the Court approved were ways Florida could undo the discriminatory effects of the statute and make the tax scheme valid under the Commerce Clause. In the present case, plaintiff is entitled to relief because the state collected fees contrary to a statute. Because the purpose of the relief in this instance is not to undo discriminatory effects, surcharging carriers who were allegedly undercharged is unrelated to providing plaintiff with an adequate remedy in this case. The only way to provide plaintiff with "meaningful backward-looking relief," *McKesson*, supra at 31, to undo the misapplication of the statute is to order a refund of the amounts

wrongfully collected.[4] We express no opinion whether the state may surcharge other carriers because that issue is not appropriately before us in the context of this case.

VI

In Docket No. 195564, plaintiff advances several issues relating to the court's denial of plaintiff's motion for attorney fees pursuant to 42 U.S.C. § 1988. Although the court did not explicitly rule on the merits of plaintiff's claim under 42 U.S.C. § 1983, we conclude that the denial of attorney fees was appropriate because the § 1983 claim was not viable against either the state agencies or the state officials.

Case law indicates plaintiff could not prevail in a § 1983 action against the state agencies. Section 1983 applies to "person[s]," and the United States Supreme Court has held that a state agency is not a "person" for the purposes of § 1983. *Hardges v. Dep't of Social Services*, 201 Mich. App. 24, 27, 506 N.W.2d 532 (1993), citing *Howlett v. Rose*, 496 U.S. 356 (1990), and *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

Plaintiff was not entitled to relief on the basis of its § 1983 claim brought against the state officials acting in their official capacity. Section 1983 claims seeking prospective injunctive relief may be brought against state officials acting in an official capacity. *Will, supra* at 71, n. 10; *Hardges*, supra. However, the United States Supreme Court has held that a state court cannot grant injunctive or declaratory relief under § 1983 in

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[4] The holding in *McKesson* is limited to situations in which a state places a taxpayer under duress to pay tax promptly when due and limits the taxpayer to challenging the tax after payment. The state does not suggest that plaintiff was given the opportunity to challenge the fees before payment and does not suggest that a distinction should be drawn in this context between the payment of fees and taxes.

state tax cases when an adequate legal remedy exists. *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm.*, 515 U.S. 582 (1995).

We are not persuaded by plaintiff's attempt to distinguish *Nat'l Private Truck* on the basis that the fees in this case were collected under federal law pursuant to a system implemented by the ICC. Plaintiff contends the principles of comity and federal deference to state authorities underlying the decision in *Nat'l Private Truck* are not relevant in this case. However, federal law does not require that states charge the fees, but rather sets forth the method and limits on states that choose to collect the fees. Plaintiff's contention, "No issues of state tax law or state tax administration are here involved," is disingenuous and does not provide a meritorious basis for distinguishing *Nat'l Private Truck*.

We also disagree with plaintiff's suggestion that the Supreme Court intended its decision in *Nat'l Private Truck* to be limited to taxes and therefore not apply to fees. On the basis of the principles of comity and federalism, the Supreme Court concluded that Congress did not intend § 1983 claims to be brought in state tax cases when an adequate state remedy is available. Those principles apply equally well when the revenue collection is in the form of a fee.

VII

The Court of Claims properly granted plaintiff's motion for summary disposition. The state was precluded from collecting fees from plaintiff in excess of the amount charged or collected for the 1991 registration year. Plaintiff is entitled to a refund of the amount improperly collected. We also affirm the Court of Claims' denial of plaintiff's motion for attorney fees pursuant to § 1988 because plaintiff had no viable § 1983 claim against any of the defendants.

Affirmed.

RICHARD ALLEN GRIFFIN, P.J., concurred.

CONCURRING/DISSENTING OPINION

O'CONNELL, Judge (concurring in part and dissenting in part.)

I respectfully dissent from part II of the majority opinion. I find no ambiguity in the statutory provision in dispute and accordingly would instruct the Court of Claims to apply the statutory language according to its plain meaning and not according to the ICC's strained construction.

The primary goal of statutory interpretation is to ascertain and give effect to legislative purpose. *Haworth, Inc. v. Wickes Mfg. Co.*, 210 Mich. App. 222, 227, 532 N.W.2d 903 (1995). The language of the statute itself is the primary indicator of legislative intent. *Folands Jewelry Brokers, Inc. v. City of Warren*, 210 Mich. App. 304, 307, 532 N.W.2d 920 (1995). "If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted." *Dep't of Transportation v. Thrasher*, 196 Mich. App. 320, 323, 493 N.W.2d 457 (1992), aff'd, 446 Mich. 61, 521 N.W.2d 214 (1994).

The pertinent language in 49 U.S.C. § 11506(c)(2)(B)(iv)(III) provides for establishment of a fee system that "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The majority reasons that this language calls for identifying a "pertinent period" ending November 15, 1991, but that it reveals no congressional intent concerning when this period begins. The majority then resolves this supposed ambiguity by concluding that the provision refers to fees charged for the registration year that includes November 15, 1991. However, this construction

disregards the word "collected," and broadens the specific reference, "as of November 15, 1991," to indicate the whole registration year that happens to include "November 15, 1991." This distortion of the plain wording of the statute is unnecessary and inappropriate. Legislative intent "is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v. General Motors Corp.*, 448 Mich. 147, 160, 528 N.W.2d 707 (1995). The ambiguity that the majority finds is the result of the majority's failure to accept the statutory wording at face value. When a statute is clear on its face, judicial construction is unnecessary and inappropriate. *Thrasher, supra.*

As the majority states, it was the intent of Congress to "freeze fees at the level as of November 15, 1991." To determine the particulars of that intent, I would restore "collected" as the companion of "charged," and respect the specificity of "November 15, 1991." A court should presume that every word has some meaning and avoid rendering any word nugatory. *Tiger Stadium Fan Club, Inc. v. Governor*, 217 Mich. App. 439, 457, 553 N.W.2d 7 (1996). Accordingly, I would read "fee . . . that such State collected or charged as of November 15, 1991" as fixing fee levels by reference to what the state charged on, or had actually collected by, November 15, 1991.

The statute does not refer to a "period" ending on November 15, but simply to that specific date. It does not refer only to the fee structure in place at the specified time, but to fees "collected or charged" at that time, identifying fees payable to the state, or already paid to the state (for whatever the reason), as establishing the level at which the fees are to be frozen. The words "as of" in reference to a specific date clearly refer to the status quo in place on that date. Thus, the congressional intent to freeze fees at the rates "collected or

charged as of November 15, 1991" plainly recognizes for this purpose both the rates actually charged and those according to which fees were actually collected on that date.

Accordingly, because the state had collected plaintiff's fees as envisioned for the 1992 registration year "as of November 15, 1991," 49 U.S.C. § 11506(c)(2)(B)(iv)(III), by its plain terms, allows the state to continue to assess plaintiff's fees according to the new scheme under which plaintiff had tendered payment by November 15, 1991.

At stake here is the state's interest in collecting higher fees from plaintiff in accordance with recent changes in the state's regulatory scheme, and plaintiff's interest in avoiding those fee increases and continuing to operate under the old scheme. Each party argues that the other stands to receive a windfall if the other's interpretation of the statutory language at issue is adopted. That statutes have the effect, intentionally or not, of benefitting some and burdening others is not a matter of dispute, and the Intermodal Surface Transportation Efficiency Act is no exception. Under any interpretation of 49 U.S.C. § 11506(c)(2)(B)(iv)(III), someone will win and someone will lose. Although the state's reading of the statute to cause plaintiff to have to continue to pay much higher fees simply because plaintiff chose to pay 1992 fees before November 15, 1991, may seem a harsh result, the result is equally harsh if the state is obliged to forgo receiving the higher revenues to which its own laws entitle it simply because the federal statute articulated a date of late 1991 instead of early 1992. For these reasons, I would avoid any concern for who benefits, or who gets burdened, from 49 U.S.C. § 11506(c)(2)(B)(iv)(III) and simply give effect to its plain language.

Although I express no disagreement with the reasoning of part V of the majority opinion, I do not join in that part because it concerns the relief to which plaintiff is entitled, where under

my reading of the statute in question plaintiff is not entitled to any relief. I concur with parts III, IV, and VI.

MICHIGAN SUPREME COURT

[Title omitted in printing]

OPINION

Docket No. 113656.

Calendar No. 11.

Argued Oct. 11, 2000.

Decided May 15, 2001.

WEAVER, C.J.

This case presents an issue of statutory interpretation. Plaintiff, Yellow Freight System, Inc., alleges that defendants collected registration fees in excess of the amount allowed under the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506, which restricts a state's registration fees to an amount "equal to the fee . . . that such state collected or charged as of November 15, 1991," 49 U.S.C. 11506(c)(2)(B)(iv)(III). Specifically, plaintiff contends that in determining the amount of the fee charged or collected on November 15, 1991, one must consider the effect that any then existing reciprocity agreements had on the fees.

We reject plaintiff's claims and hold that in determining the "fee . . . collected or charged" under 49 U.S.C. 11506(c)(2)(B)(iv)(III), Michigan's reciprocity agreements are irrelevant. We reverse the Court of Appeals decision affirming the Court of Claims order for summary disposition in favor of plaintiff and remand this case to the Court of Claims for further proceedings consistent with this opinion.

Congress has the power to "regulate Commerce . . . among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" that power to regulate commerce. U.S. Const., art. I, § 8. Under the Commerce Clause, states can impose significant regulatory burdens on interstate motor carriers only when authorized to do so by Congress. *Michigan Pub. Utilities Comm. v. Duke*, 266 U.S. 570, 577. Over the years Congress has authorized the states to require registration of interstate motor carriers, subject to the supervision of the Interstate Commerce Commission. See Motor Carrier Act of 1935, P.L. 74-265, 49 U.S.C. 301 *et seq*. In 1991, Congress passed the ISTEA,[1] which directed the Interstate Commerce Commission (ICC) to restructure the then existing regulations governing vehicle registration and registration fees. 49 U.S.C. 11506. As a result, the ICC issued the "single state" registration system (SSRS) in 1993, 49 C.F.R. 1023.[2]

A brief overview of the previous interstate motor carrier registration system is helpful in understanding the dispute now before this Court. Before 1991, states could require interstate motor carriers to annually register and pay fees on each vehicle

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[1] Provisions similar to those in this section are now contained in 49 U.S.C. 14504.

[2] This was redesignated in 1996 as 49 C.F.R. 367.

that operated within its borders. Thirty-nine states, including Michigan, elected to participate in a "bingo card" system.[3] Under the "bingo card" system interstate motor carriers attached a "bingo card" to each of their motor vehicles. States through which the vehicle traveled then issued each vehicle a registration "stamp" which was placed in a designated area on the bingo card. Participating states were allowed to charge no more than $10 per stamp.

While operating under the prior "bingo card" registration system, some states entered into reciprocity agreements, under which a state would discount or waive the registration fee for carriers based in the other's state. The motor carrier's principal place of business was most commonly used as the basis for determining reciprocity. Michigan, however, initially based its reciprocity agreements on the state in which the vehicle was "base-plated," i.e. where it was registered or license-plated.[4]

Seeking to "benefit the interstate carriers by eliminating unnecessary compliance burdens" and "to preserve revenues for the states which had participated in the bingo program," Congress replaced the old system by enacting the ISTEA.[5] The

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[3] The "bingo card" system served three main purposes: (1) to make it easier to determine whether a specific vehicle had been registered by simply looking at the "bingo card," (2) to ensure compliance by interstate motor carriers to register all vehicles in operation, and (3) to prevent carriers from operating uninsured vehicles.

[4] In other words, Michigan would waive its registration fee for vehicles base-plated in a state that waived its fee for vehicles that were base-plated in Michigan.

[5] H. R. Conf. Rep. No. 102-404, 102nd Cong., 1st Sess. 437 (1991), reprinted in 1991 U. S. Code Cong. & Admin. News, 1526, 1679, 1817.

SSRS was intended to serve as the sole avenue for state registration of interstate carriers.[6] *Nat'l Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm.*, 309 U.S. App. D.C. 325, 41 F.3d 721 (1994). Under the SSRS a motor carrier registers annually with only one state. This "registration state" is responsible for collecting the per-vehicle fees and distributing them to any participating states through which the carrier runs its motor vehicles. 49 U.S.C. 11506(c)(2)(A)(iii).

The section of the ISTEA at issue in the present case is subsection 11506(c)(2)(B)(iv). It provides that each state "shall establish a fee system" that "result[s] in a fee for each participating state that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . ."

In 1991, before the implementation of the SSRS, the Michigan Public Service Commission (MPSC) altered its reciprocity agreements. The MPSC adopted the more common "place of business" method of determining reciprocity, instead of the "base-plated" system that the MPSC had been using. This change was scheduled to become effective in February 1992. The MPSC mailed renewal applications reflecting this change to all interstate motor carriers, including the plaintiff, in September 1991. Plaintiff paid its 1992 fees[7] in September of

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[6] Participation in the SSRS was limited to the thirty-nine states that had elected to participate in the "bingo card" program. 49 U.S.C. 11506(c)(2)(D).

[7] At that time plaintiff's principal place of business was in Kansas, and it had 3,730 vehicles base-plated in Illinois and Indiana. Under Michigan's old reciprocity agreements, Michigan's fees for those 3,730 vehicles base-plated in Illinois and Indiana would have been waived. However, after Michigan changed its method for determining reciprocity to one based on a company's principal place of business, Plaintiff was required to pay a $10 vehicle registration fee for each of the 3,730 vehicles. Thus, rather than paying nothing under the old reciprocity method, plaintiff was required to pay $37,300 annually under Michigan's new system.

1991, under protest. Subsequently, plaintiff instituted this litigation.

Plaintiff contended that Michigan could not alter its reciprocity agreements, arguing that under the federal statute those agreements were frozen at their November 15, 1991, levels. Ruling on cross motion, the Court of Claims agreed with plaintiff and granted its motion, in part, for summary disposition.[8] In a two-to-one decision, the Court of Appeals affirmed the Court of Claims ruling. 231 Mich. App. 194, 585 N.W.2d 762 (1998). This Court granted leave to appeal, 461 Mich. 1009, 611 N.W.2d 796 (2000).

II

There is no dispute that 49 U.S.C. 11506(c)(2)(B)(iv)(III) froze the registration fees that a state can charge as of November 15, 1991. The parties dispute the proper interpretation of a key phrase in that section of the ISTEA: "equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The fundamental question before us is whether Michigan's reciprocity agreements should be considered in determining what fees were charged or collected as of November 15, 1991. We conclude that under the plain language of the statute, reciprocity agreements are not relevant in making that determination.

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[8] Plaintiff's complaint also sought attorney fees under 42 U.S.C. 1988. The Court of Claims did not grant this relief, and plaintiff has not appealed that decision to this Court.

A

This is an issue of first impression for this Court; nor have any other state courts addressed it. The only court that has considered it is the District of Columbia Circuit Court of Appeals, *Nat'l Ass'n of Regulatory Utility Comm'rs*, *supra*. That court followed the ICC's decision[9] to ban states from charging registration fees in excess of preexisting reciprocal discounts, saying:

> [W]e think the Commission was correct in concluding that the plain language of the statute precludes petitioners' interpretation. It does not matter whether Congress actually focused on the reciprocal discount practice or even was aware of it. Nor is it of any significance that the Commission initially misread the statute; that is what comment periods are for. *Id.*, at 729.

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[9] The ICC has taken varying positions on this issue. In its Advance Notice of Proposed Rulemaking, 57 Fed. Reg. 20,072 (1992), and its Notice of Proposed Rulemaking, 58 Fed. Reg. 5951 (1993), the ICC found that the reciprocity agreements were made voluntarily, and that there was no good reason for the ICC's involvement in them. The ICC had noted that "it might place a heavy administrative burden on a registration State were we to require that it collect from different carriers different fees from the same State depending on the various reciprocal agreements negotiated by the various states in which each carrier operates." 9 I.C.C.2d 610, 617 (1993).

However, the ICC subsequently reversed its position, and now says "we have concluded that participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov. 15, 1991, as required by § 11506(c)(2)(B)(iv)." *Single State Ins. Registration Exparte No. MC-100 (Sub-No. 6)*, 9 I.C.C.2d 610, 618-619 (1993).

We are not bound to follow that decision,[10] and, for the reasons given below, we do not agree with the federal court's decision to defer to the ICC's interpretation of the ISTEA.

B

Plaintiff contends that in interpreting the ISTEA we must give deference to the ICC's interpretation. Because the issue is the interpretation of a federal statute and the deference due a federal agency's construction of that statute, we will apply the rules of construction set out by the federal judiciary.[11] The

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[10] Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes. See *Bement v. Grand Rapids & Indiana R. Co.*, 194 Mich. 64, 160 N.W. 424 (1916), and *In re Hopps Estate*, 324 Mich. 256, 36 N.W.2d 908 (1949). However, where there is no United States Supreme Court decision upon the interpretation in question, the lower federal courts' decisions, while entitled to respectful consideration, are not binding upon this Court. See *Winget v. Grand Trunk W. R. Co.*, 210 Mich. 100, 117, 177 N.W. 273 (1920), *Schueler v. Weintrob*, 360 Mich. 621, 105 N.W.2d 42 (1960), and 21 CJS, Courts, § 159, pp. 195-197.

[11] This Court has not previously determined what deference the courts of this state owe to a federal agency's interpretation of a federal statute. However, in that circumstance the Court of Appeals has applied the federal standards of deference as set out in *Chevron*, supra at 2778. See *Walker v. Johnson & Johnson Vision Products, Inc.*, 217 Mich. App. 705, 713, 552 N.W.2d 679 (1996), *Gibbs v. General Motors Corp.*, 134 Mich. App. 429, 432, 351 N.W.2d 315 (1984), and 231 Mich. App. at 200, 585 N.W.2d 762. This is also the approach taken by several other state courts. See for example: *Totemoff v. State*, 905 P.2d 954, 967 (Alaska, 1995), *Delorme v. North Dakota Dep't of Human Services*, 492 N.W.2d 585, 587, n. 2 (N.D., 1992), *Rodriguez v. Perales*, 86 N.Y.2d 361, 367, 657 N.E.2d 247, 633 N.Y.S.2d 252 (1995), and *Bell Atlantic Mobile, Inc. v. Dep't*

seminal case is *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837. There the United States Supreme Court established that a court must first determine whether the statute's meaning is clear; if so, then the court must apply the statute as written. If the statute is ambiguous, then the court must give deference to the agency's interpretation.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-843.

Here we find that the plain meaning of the terms of the ISTEA is clear, and we apply the statute as written. Because

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of Public Utility Control, 253 Conn. 453, 470, 754 A.2d 128 (2000).

we find that the statute is not ambiguous,[12] we need not proceed to the second step of *Chevron, supra*, and we do not reach the agency's interpretation.

C

The question before us is whether any then-existing reciprocity agreements should be considered when determining what fee the state charged or collected as of November 15, 1991. The ISTEA itself refers only to the fee collected or charged, and contains no reference to reciprocity agreements. 49 U.S.C. 11504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system" that "result[s] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the state had in place on November 15, 1991. We must look not at the fees paid by plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991.

To determine what registration fee Michigan charged on November 15, 1991, we examine M.C.L. § 478.7(4); MSA 22.565(1)(4) in the Motor Carrier Act. Since 1989 that statute has provided for a fee of $10 to be charged for those motor carrier vehicles operating in Michigan and licensed in another state or province of Canada:

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[12] The dissent contends that the statute is ambiguous, asserting that this is demonstrated by "the several interpretations of its wording advanced by the parties." If the parties' conflicting interpretations were the measure of a statute's ambiguity, then almost every statute litigated would be deemed ambiguous. A statute is not ambiguous because it requires careful attention and analysis.

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00.

The same statute, M.C.L. § 478.7(4); MSA 22.565(1)(4), also gives the commission the ability to waive the $10 fee under certain circumstances:

> The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

Thus, under M.C.L. § 478.7(4); MSA 22.565(1)(4), the fee charged as of November 15, 1991, was $10. While that fee may be waived, and thus not "charged or collected," *for a particular carrier* under a reciprocity agreement, such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. 11506(c)(2)(B)(iv)(III) is on the generic "fee" that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier.

The ICC's position that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov. 15, 1991, as required by § 11506(c)(2)(B)(iv),"[13] added a concept not

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[13] *Single State Ins. Registration Exparte No. MC-100 (Sub-No. 6)*, 9 I.C.C.2d 610 (1993).

within the express language of the statute. It added consideration of voluntary agreements between the states to waive or reduce the fees imposed. It is not for the ICC, or this Court, to insert words into the statute.

III

We hold that Michigan's reciprocity agreements are not relevant in determining what fee was "charged or collected" as of November 15, 1991. The lower courts erred in granting summary disposition for plaintiffs. We reverse the Court of Appeals decision, and remand this case to the Court of Claims for further proceedings consistent with this opinion.

CORRIGAN, C.J., and TAYLOR, YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

DISSENTING OPINION

MARILYN J. KELLY, J. (dissenting).

I disagree with the majority's conclusion that reciprocity agreements are not relevant in determining the registration fees that Michigan charged under the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506.[1] One such agreement waived registration fees for vehicles licensed in Illinois, including plaintiff's vehicles, so that no fee was collected or charged within the meaning of the statute. Consequently, I would affirm the decisions of the Court of Appeals and the Court of Claims.

The ISTEA replaced the bingo card system of registering interstate motor carriers with a single state registration system. *Nat'l Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm.*, 309 U.S. App. D.C. 325, 328, 41 F 3d 721

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[1] The ISTEA now appears at 49 U.S.C. 14504.

(1994). Under the ISTEA system, a state can charge a fee "that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III). The question in this case is what effect reciprocity agreements have on determining the fee that Michigan can charge under the single state registration system.

As an initial point, I disagree with the majority's conclusion that the meaning of the language in the statute is plain, reasonably susceptible of only one interpretation. Rather, I find it ambiguous. A statute is ambiguous when reasonable minds could differ as to its meaning. *In re MCI Telecommunications Complaint*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999). That the ISTEA is ambiguous as regards the reciprocity agreements is demonstrated by the several interpretations of its wording advanced by the parties and by justices on this Court. The language of the statute supports both positions, allowing for opposing and similarly plausible constructions. Despite careful attention and analysis, reasonable minds can and do differ with respect to the statute's meaning concerning reciprocity agreements.

Alternatively, if the statute's language were plain, the meaning of the words "collected or charged" must lead to a result opposite that reached by the majority. The majority concludes that Michigan was entitled to charge plaintiff a registration fee, but the majority's interpretation of the ISTEA depends on addition to the statute of words not present there. Whether the state of Michigan could have collected or charged a "generic" per vehicle fee is not pertinent. The statute specifies "fees . . . collected or charged as of November 15, 1991." It does not say "fees that the state could have collected or charged."

While the ISTEA does not expressly make reference to reciprocity agreements, the fee system in place on November 15, 1991, does. MCL 478.7(4); MSA 22.565(1)(4) provides:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

A plain reading of this provision leads to the conclusion that reciprocity agreements are an inherent part of the state's registration fee system. The generic fee levied under the statute is not absolute, but subject to reciprocity agreements that waive the fee. Thus, the fee charged as of November 15, 1991, was $10.00, unless a reciprocity agreement pertained. Voluntary agreements to waive the fee are relevant in determining the per vehicle fee system in place on November 15, 1991, as well as the fee collected or charged pursuant to that system.

The parties do not dispute that Michigan had a reciprocity agreement with Illinois that, by its terms, waived Michigan registration fees for interstate motor carriers licensed in Illinois. Pursuant to the agreement, the state did not charge registration fees for plaintiff's vehicles in 1990 and in 1991. It was not until Michigan revised its reciprocity system in 1991 that it charged plaintiff a registration fee.

This change in the reciprocity system did not become effective until the 1992 registration year. Plaintiff was not charged a registration fee in Michigan, nor was one collected

from it in Michigan for the 1991 registration year. The fact that the state had a right to or could have charged a "generic" registration fee does not change the fact: it did not charge plaintiff a fee until the 1992 registration year.

The majority's characterization of the language of the statute as "plain" is belied by the fact that the majority is obliged to construe the phrase "collected or charged" to reach its result. Only a strained reading of "collected or charged" leads to the conclusion that the state charged a fee when it did not do so. That the statute does not expressly mention reciprocity agreements does not change the fact that reciprocity agreements were an inherent part of the fee system in place on November 15, 1991. In this case, the reciprocity agreement with Illinois in effect during the 1991 registration year caused Michigan to waive the fees it might have imposed under M.C.L. § 478.7; MSA 22.565(1). As a consequence, no fees had been "collected or harged as of November 15, 1991."

The Court should give deference, as did the District of Columbia Circuit Court of Appeals,[2] to the Interstate Commerce Commission's construction of the language in question, because it is based on a permissible construction of the ISTEA. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). It should affirm the decisions of the Court of Appeals and the Court of Claims in favor of plaintiff.

MICHAEL F. CAVANAGH, J. (dissenting).

I disagree with the majority's conclusion that the relevant provision of the federal Intermodal Surface Transportation Efficiency Act (ISTEA), 49 U.S.C. 11506(c)(2)(B)(iv)(III), is

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[2] *Nat'l Ass'n of Regulatory Utility Comm'rs, supra.*

unambiguous and that this Court is free to decide that the section does not take into account reciprocity agreements. Rather, I conclude that this provision is ambiguous, and that the Interstate Commerce Commission (ICC) has permissibly construed it to take into account reciprocity agreements. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), then, this Court should defer to the ICC's interpretation of that provision. I, therefore, would affirm the judgment of the Court of Appeals, and must respectfully dissent.

In this case, the Court is called on to review a federal statute that was administered by the ICC when this case arose.[1] As the majority points out, under the Supreme Court's decision in *Chevron*, when a court reviews an agency's construction of a statute the agency administers, the court faces a two-part inquiry. First, the court must determine whether the statute clearly and unambiguously expresses the legislative intent. If so, it then must give effect to the statute as written. However, if the statute is not clear and unambiguous, the court "does not simply impose its own construction on the statute," but instead reviews whether the agency has permissibly construed the statute. If it has, the court should defer to the agency's construction. *Chevron* at 842-843. As alluded, the ICC, in *Single State Insurance Registration*, 9 I.C.C.2d 618, 618-619 (1993), construed the statute in question to take into account reciprocity agreements that exempted some interstate carriers from state fees, a conclusion opposite to that reached by the majority.

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[1] The ICC was abolished in 1996, and the references to the ICC in the governing statute, which was recodified, were changed to refer to the Secretary of Transportation. See 49 U.S.C. 14504; see also PL 104-88, 109 Stat. 803, Tit. I, § 103.

To determine whether a statute clearly and unambiguously expresses legislative intent, courts begin with the statutory language. If the words of a statute are clear and unambiguous, the court must apply them as written, and no further judicial construction is required or permitted. See, e.g., *Tryc v. Michigan Veterans' Facility*, 451 Mich. 129, 135, 545 N.W.2d 642 (1996). However, when there can be reasonable disagreement over a statute's meaning, see *People v. Adair*, 452 Mich. 473, 479, 550 N.W.2d 505 (1996), or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, that statute is ambiguous. See 2A Singer, Statutes & Statutory Construction (6th ed.), § 45.02, pp. 11-12. For example, this Court has concluded that statutes have been ambiguous when one word in the statute has an unclear meaning, see *Perez v. Keeler Brass Co.*, 461 Mich. 602, 610, 608 N.W.2d 45 (2000), when a statute's interaction with another statute has rendered its meaning unclear, see *People v. Denio*, 454 Mich. 691, 699, 564 N.W.2d 13 (1997), or when application of the statute to facts has rendered the correct application of the statute uncertain, see *Elias Bros. v. Treasury Dep't*, 452 Mich. 144, 150, 549 N.W.2d 837 (1996).

In this case, the majority concludes that the governing ISTEA provision is plain and unambiguous. In the words of our prior decisions, then, the majority concludes that there cannot be reasonable disagreement over the statute's meaning, and that reasonably well-informed people cannot understand the statute in two or more different senses. Before amendment, the governing section provided that the ICC, and through it, states

> shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . . [49 U.S.C. 11506(c)(2)(B)(iv).]

I cannot agree that the meaning of this language is clear and unambiguous. Rather, it is subject to reasonable disagreement.

The majority concludes that the fee "collected or charged" refers only to the fee system a state had in place on November 15, 1991, and that this is clear from the plain meaning of § 11506(c)(2)(B)(iv). See op. at 33, 627 N.W.2d at 242. However, the conclusion that the fee "collected or charged" refers only to the fee system requires that "collected or charged" include the possibility that the fee "charged" can be simultaneously "waived." *Id.* at 33, 627 N.W.2d at 242. Otherwise, there would be no question that the state had not collected or charged anything from plaintiff until the changes in the reciprocity system became effective in 1992, after the cutoff date provided in § 11506. The conclusion that a fee can be "charged," yet concurrently "waived," though, is not consistent with this Court's approach to plain language.

When construing a statute according to its plain language, unless the statute itself dictates otherwise, this Court generally turns to dictionary definitions of the statutory terms to find those terms' ordinary and generally accepted meanings. See, e.g., *Denio* at 699, 564 N.W.2d 13. Applying this approach to

the instant case calls the majority's conclusion that a fee can be simultaneously "charged" and waived into question. "Charge" is defined variably as (1) "To hold financially liable; demand payment from," (2) "To demand or ask payment," (3) "A financial burden, as a tax or lien," (4) "To set or ask (a given amount) as a price," (5) "Expense; cost," or (6) "The price set or asked for something." *The American Heritage Dictionary* (2d College ed, 1982).

The problem in this case is that the ordinary and generally accepted meanings of the term "charge" do not dictate the majority's conclusion. Rather, the definitions of "charge" present a spectrum of concepts ranging from those that might encompass the majority understanding that a fee can be "charged" but concurrently "waived" — definitions 4, 6, and arguably 5 — to those that do not encompass that understanding because they require that the charge be a "demand" or a "burden." Definitions 1, 2, and 3 do not support the majority's conclusion because, under those meanings of "charge," the state would have to waive a fee, yet also hold a carrier financially liable for it, or demand or ask for payment of a fee that had been waived. Similarly, if a fee has been "waived," it is not a financial burden on the party responsible for the fee. In this case, plaintiff was not made financially liable for, or financially burdened with, the waived fee, and the state did not demand the waived fee before November 15, 1991. Thus although several accepted definitions of "charge" support the majority conclusion, several others weigh against it.

As mentioned above, the meaning of a facially unambiguous term can be ambiguous in certain circumstances. See *Denio* at 699, 564 N.W.2d 13; *Perez* at 610, 608 N.W.2d 45. Thus, although "charged" may not at first blush appear ambiguous, in the context of a fee that was established in a fee

system, but never demanded because of a reciprocity agreement, "charged" is ambiguous because the fee may or may not fit the definition of a fee that is "charged." If the statutory term "charged" is narrow and requires a demand for payment, the state had not charged plaintiff the fees before November 15, 1991, and cannot charge plaintiff for later years. On the other hand, if "charged" is broad and requires only the setting of a fee, the state had charged the fee by the cutoff date, and plaintiff cannot avoid payment. Compare *Perez* at 610, 608 N.W.2d 45 ("refuses" could have a broad or narrow meaning).

Although it does so without explanation, the majority chooses the latter meaning, concluding that even when the fee was waived for particular carriers, it still had been charged in general. Op. at 33, 627 N.W.2d at 242. I do not contend that the majority has chosen the wrong definition of "charge," or that its conclusion about § 11506's meaning is unreasonable. However, for the majority to come to its conclusion, it had to resolve the ambiguity surrounding the meaning of the statutory term "charged," specifically, whether "charged" was used in its broad or narrow sense.[2] Normally, this Court has a duty to

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[2] To conclude that the fee "charged" refers only to the fee set by the fee system, the majority must nevertheless conclude that "charged" is broad, meaning only that the state "set a price" for carriers but did not hold a carrier liable for that price. Such an understanding comports only with definitions 4 and 6 above, but not the narrower meaning of "charge" in definitions 1, 2, and 3. Otherwise, the fee "charged" could refer to only a particular fee and not the system itself.

Further, if the majority is correct that the fee charged refers only to the fee system in place, but not the fees charged of particular carriers, then apparently Michigan could waive fees for every carrier operating in the state, under reciprocity agreements or not, but nevertheless continue to be said to "charge" a generic fee. In such a scenario, the

make such a decision. In this case, however, the different possible meanings of "charged" present an ambiguity in § 11506. Under *Chevron*, rather than this Court imposing its own construction on the statute, we must consider whether the ICC, the agency responsible for administering this statute and which has already resolved this ambiguity in § 11506, did so permissibly.

I conclude that the ICC did permissibly construe the statute, and, therefore, I would defer to that agency. In *Single State*, the ICC considered whether the freeze on registration fees enacted through the ISTEA should take reciprocity agreements into account. It decided that the ISTEA does take reciprocity agreements into account when freezing the fees that states "charged." Thus, an interstate carrier that was not charged any fees before November 15, 1991, because it was operating under a reciprocity agreement, could not be charged fees after that time. See *Single State*, supra at 617-619. This interpretation evidences that the ICC preferred the narrow approach to "charged," concluding that an interstate carrier had not been "charged" a registration fee unless a state had made a demand for the fee, or unless the carrier had been held financially liable for the fee. Under reciprocity agreements, states did not make demands for fees, and did not hold carriers liable for fees. Hence, carriers operating under those agreements were not "charged" before the cutoff date, and could not be charged after it. Though this Court may not prefer the ICC's interpretation of

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majority would apparently conclude that Michigan "charged" a fee even though it held no carrier financially liable for any fee.

Again, there is room for reasonable disagreement over the proper understanding of these statutory terms. That room for disagreement, though, indicates that we should defer to the ICC understanding.

§ 11506 or the narrow approach to the term "charged," in light of the different possible meanings of the statute, the ICC approach is certainly a permissible construction. I would, therefore, defer to that agency's interpretation of this section.

In sum, I disagree with the majority's conclusion that 49 U.S.C. 11506 is not reasonably subject to different understandings. Whether the statutory term "charged" is understood narrowly or broadly affects this statute's meaning. Because the statute can be understood differently, this Court's only role is to consider whether the federal agency responsible for administering this statute, which has already considered the question before this Court, permissibly answered that question. The ICC took a narrow view of the meaning of "charged," but nevertheless a view that is supported by § 11506. I would defer to that agency's view and, therefore, must respectfully dissent.

Supreme Court, U.S.
FILED

APR 5 2002

OFFICE OF THE CLERK

No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,

Petitioner,

v.

MICHIGAN, ET AL.,

Respondents.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under 49 U.S.C. § 11506(c)(1), the Interstate Commerce Commission was required to prescribe standards governing the manner in which States collected registration fees from for-hire motor carriers engaged in interstate commerce. In particular, 49 U.S.C. § 11506(c)(2)(B)(iv)(III) specified that the new standards "shall * * * result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." Implementing this provision, the ICC determined that States may not collect fees in excess of those collected or charged under pre-existing reciprocity agreements — *i.e.*, agreements under which a State reduced or waived the fee charged to carriers or vehicles based in another State if the other State provided a reciprocal reduction or waiver.

In this case, the State of Michigan nevertheless sought to charge fees that had been waived by its reciprocity policy as of November 15, 1991. The Michigan Supreme Court upheld the State's power to do that, holding that the only fee frozen by the federal statute was what the court termed the State's "generic fee," which the court defined as the maximum amount that could have been charged under state law in the absence of a reciprocity agreement.

Against this background, the Court has posed the following question:

Whether the Michigan Supreme Court erred in holding that, under 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999), only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

The Michigan Department of Treasury and its State Treasurer, the Michigan Department of Commerce and its Director, and the Michigan Public Service Commission and its Commissioners, John G. Strand, Ronald E. Russell, and John L. O'Donnell, are respondents.

RULE 29.6 STATEMENT

Petitioner Yellow Transportation, Inc. is a wholly owned subsidiary of Yellow Corporation, a publicly held company.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Michigan Supreme Court (JA 39-59) is reported at 627 N.W.2d 236 (2001). The opinion of the Michigan Court of Appeals (JA 23-38) is reported at 585 N.W.2d 762 (1998). The opinion of the Michigan Court of Claims (JA 19-22) is unreported.

JURISDICTION

The opinion and order of the Michigan Supreme Court were entered on May 15, 2001. A petition for certiorari was filed on August 13, 2001 and granted on January 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the Appendix to the Petition for Certiorari ("Pet. App.") at 99a-101a. The statute involved is 49 U.S.C. § 11506 (since recodified at 49 U.S.C. § 14504).

STATEMENT OF THE CASE

When Congress reformed the manner in which States may impose registration fees on vehicles engaged in interstate commerce by passing the Intermodal Surface Transportation Efficiency Act ("ISTEA") in 1991, it included a provision that prohibited States from raising the fees that were in place for trucking operations conducted as of November 15, 1991. In particular, Congress ordered the Interstate Commerce Commission ("ICC") to establish standards for the new system, specifying that the standards must "result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November

15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III) (1994).[1] In carrying out this statutory mandate, the ICC concluded that States could not reinstitute fees that had been waived as of that date pursuant to so-called "reciprocity agreements" with other States because such fees had not actually been "collected or charged." The ICC's interpretation of the ISTEA was upheld by the D.C. Circuit. *National Ass'n of Regulatory Util. Comm'rs ("NARUC")* v. *ICC*, 41 F.3d 721, 724-725 (D.C. Cir. 1994).

In this case, the State of Michigan nevertheless imposed registration fees that had been waived pursuant to such reciprocity agreements as of November 15, 1991. Petitioner Yellow Transportation, Inc. ("Yellow") is one of the nation's largest interstate trucking companies. Applying its new policy to Yellow, Michigan imposed a registration fee of $10 for each of Yellow's trucks, even though it is undisputed that Yellow would not have been charged a fee to conduct operations in Michigan as of November 15, 1991 with respect to any of those trucks.

When Yellow filed suit to recover its registration fees, Michigan's authority to collect the fees was upheld by the Michigan Supreme Court, which expressly rejected the reasoning of the ICC, the D.C. Circuit, and two Michigan lower courts that had ruled in Yellow's favor. To reach this conclusion, the court below read the crucial statutory phrase ("collected or charged") to refer only to the "generic fee" imposed under state law — a term defined by that court as the

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[1] In 1995, Congress abolished the ICC and transferred the ICC's responsibilities under the ISTEA to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804. At that time, 49 U.S.C. § 11506 was recodified at 49 U.S.C. § 14504. For convenience, we refer throughout to the original codification at 49 U.S.C. § 11506.

fee that *could have been* collected or charged if the State had chosen not to waive the fee under a reciprocity agreement. This peculiar decision cannot be squared with the plain statutory language and departs radically from the manifest intent of Congress. The decision below accordingly should be reversed.

A. Statutory Background

Beginning in 1965, Congress enacted legislation permitting States to require registration of for-hire motor carriers intending to operate in interstate commerce within their borders.[2] Congress directed the ICC to maintain standards under which these state registration requirements would not constitute an undue burden on interstate commerce. Under the resulting system, motor carriers paid fees separately to each of the States that assessed registration fees for interstate operations. This process required motor carriers to carry in each of their vehicle cabs so-called "bingo cards" bearing stamps from each of the relevant States to document the payment of the required fees. See *NARUC*, 41 F.3d at 724.

In 1991, Congress passed the ISTEA to streamline the process by which States collect registration fees from for-hire motor carrier vehicles operating in interstate commerce. The thrust of the ISTEA was to establish a single state registration system ("SSRS"). Under the SSRS, motor carriers pay all registration fees to a single base State — generally, the carrier's principal place of business — which then distributes the fees to other States. Motor carriers obtain receipts from their base State, which constitute evidence of registration in all other participating States. The ISTEA was originally codified at 49

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[2] See Pub. L. No. 89-170, § 2, 79 Stat. 648, added September 6, 1965, initially codified as 49 U.S.C. § 202(b)(2), recodified as 49 U.S.C. § 11506 by Pub. L. No. 95-473, 92 Stat. 1448, added October 17, 1978 (repealed 1991).

U.S.C. § 11506, but was subsequently recodified at 49 U.S.C. § 14504.

Of particular importance here, Congress intended that the changes implemented by the ISTEA not permit States to impose excessive registration fees that would burden interstate commerce. See H.R. Conf. Rep. No. 102-404, 102d Cong., 1st Sess. 437-438 (1991), reprinted in 1991 U.S.C.C.A.N. 1679, 1817-1818. Thus, while Congress delegated the task of creating and implementing the SSRS to the ICC, it included in the ISTEA a provision specifically prohibiting States from increasing their registration fees. The statute thus directs the ICC to adopt standards that, in relevant part,

> will minimize the costs of complying with the registration system, and * * * will result in a fee for each participating State *that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.*

49 U.S.C. § 11506(c)(2)(B)(iv) (emphasis added). A separate provision of the legislation contains a congressional finding that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 11506(c)(2)(C).[3]

B. ICC Implementation Of The ISTEA

In light of the ISTEA's express command that "the Commission shall prescribe amendments to the standards" governing state registration of for-hire interstate motor carriers (49 U.S.C. § 11506(c)(1)), the ICC initiated a rulemaking

[3] As of 1991, 39 States charged registration fees under the bingo card system. See *NARUC*, 41 F.3d at 724. Only those States were made eligible to participate in the SSRS. See 49 U.S.C. § 11506(c)(2)(D).

proceeding. Following an extensive notice and comment period — in which both the petitioner and the respondents in this litigation submitted comments — the ICC issued regulations, standards, and interpretations of the statute necessary for application of those standards. See 49 C.F.R. § 1023 (since redesignated as 49 C.F.R. § 367); *Single State Insurance Regulation*, 9 I.C.C.2d 610 (1993) (Pet. App. 43a-96a).

One of the agency's interpretations concerned the effect of certain pre-existing reciprocity agreements between States, under which one State agreed to reduce or waive its registration fees for motor carriers or their vehicles based in another State if that other State provided a reciprocal reduction or waiver. After reviewing the numerous comments on this issue, the ICC determined that States were *not* permitted to modify or rescind reciprocity agreements where doing so would enable them to collect registration fees higher than those they had collected on November 15, 1991. See *Single State Insurance Regulation*, 9 I.C.C.2d at 617-619 (Pet. App. 52a-54a). The ICC explained that this rule was necessary both to "carry out the letter of the law that fees be frozen as of November 15, 1991" and to implement "the intent of the law that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced." *Id.* at 618 (Pet. App. 53a-54a). Under a contrary approach, the ICC concluded, "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls." *Ibid.* (Pet. App. 54a).[4]

[4] Initially, the ICC had questioned its authority to require States to give continuing effect to fee levels established under reciprocity agreements, expressing the view that preserving these fee levels might prove administratively burdensome for some States. See *Single State Insurance Regulation*, No. MC-100 (Sub-No. 6), 1993 WL 17833, at *12 (ICC Jan. 13, 1993). After examining the statutory language and the comments filed on this issue, however, the ICC

Dissatisfied with the ICC's interpretation of the statute, several States and organizations of States challenged that interpretation in the D.C. Circuit. The court unanimously affirmed the ICC's interpretation, expressly noting that "the plain language of the statute precludes" reading the ISTEA in a manner that permits States to rescind or modify their reciprocity agreements and thereby collect more in registration fees than they did on November 15, 1991. *NARUC*, 41 F.3d at 729.

C. Michigan's Reciprocity Agreements

1. Prior to 1988, Michigan had entered into reciprocity agreements with several States and Canadian provinces regarding the registration fees that would be charged and collected for trucks operating in interstate commerce. JA 5. In 1988 and 1989, Michigan changed its law. Under the new system, Michigan permitted the imposition of a maximum fee of $10 per vehicle, but expressly authorized the Michigan Public Service Commission ("MPSC") to enter into reciprocal agreements and to waive the fee as to vehicles based in States or provinces that did not charge a fee to vehicles based in Michigan. See Mich. Comp. Laws § 478.7(4).

To implement the new legal regime, the MPSC issued a letter canceling its previous reciprocity agreements and contacted other States and provinces to determine whether those States and provinces charged registration fees to vehicles based in Michigan. JA 6. The MPSC made a policy decision to enter into informal reciprocity agreements with those States and provinces that did not charge or collect registration fees

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recognized that its initial view was inconsistent with the letter and intent of the ISTEA. See *Single State Insurance Regulation*, 9 I.C.C.2d at 618 (Pet. App. 53a-54a).

from vehicles based in Michigan. *Ibid.*[5] Michigan's system of reciprocity followed a "base plating" model. JA 6. Thus, when determining where a vehicle was based for purposes of applying its reciprocity agreements, Michigan looked to the jurisdiction where the vehicle was registered and had obtained its license plate, rather than to the principal place of business of the trucking company that operated the vehicle. JA 6-7. That system was in effect during 1990 and 1991. JA 6.

In the fall of 1990, Michigan sent interstate motor carriers (including Yellow) a form for registering their vehicles to operate in interstate commerce in Michigan during 1991. JA 13. At that time, pursuant to its reciprocity agreement with Illinois, Michigan did not require carriers to pay a fee for any of their vehicles that had been commercially plated in Illinois. JA 6. Because Michigan's vehicle registration year ran from February-to-February, Michigan accordingly did not charge or collect any fee from Yellow to entitle the company's Illinois-plated vehicles to travel in the State as of November 15, 1991. JA 6, 10, 13-14.

For its cab card stamps effective February 1, 1992, for the 1992 registration year, Michigan decided to modify its reciprocity agreements, changing the basis for determining reciprocity from the State in which the vehicle was base-plated to the State in which the trucking company maintained its

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[5] In its brief supporting the grant of certiorari, the United States questioned whether Michigan's fee waivers were reciprocated by the other State in all instances and therefore constituted "reciprocity agreements" in a literal sense. See Brief for the United States as Amicus Curiae at 14-15 (filed Jan. 2, 2002). The United States also observed, however (*ibid.*), that such a factual inquiry is irrelevant to the question presented. For convenience, we use the term "reciprocity agreement" throughout to refer to any state policy that precluded the collection or charge of fees from a given category of vehicle or carrier.

principal place of business. JA 6-7, 10, 42. For administrative convenience, Michigan sent its 1992 renewal applications to interstate motor carriers in September 1991, with payment due by January 1, 1992. JA 7, 25. Yellow returned the form and its payment in October 1991. JA 8.[6]

Michigan's modification of its reciprocity agreements had a dramatic impact on many interstate motor carriers, including Yellow. As of 1994, Yellow's entire commercial fleet was base-plated in Illinois, with which Michigan had a reciprocity agreement. JA 15-16. Yellow's principal place of business, however, was in Kansas, a State with which Michigan did not have an agreement. JA 8. Thus, had Michigan applied the system of reciprocity governing the fees collected or charged for operation as of November 15, 1991, Yellow would not have had to pay any fees for the 1994 registration year. Under Michigan's revised system of reciprocity, Yellow was obligated to pay $10 for each of its vehicles.

The SSRS provisions of the ISTEA came into effect in 1994. See 49 U.S.C. § 11506(c)(3). During 1993, Yellow contacted Michigan to confirm that the State did not intend to collect any fees to allow Yellow's vehicles to operate there in interstate commerce during 1994, pursuant to the system of reciprocity that was in place effective November 15, 1991. JA 15. Michigan, however, indicated that it intended to collect a $10 fee from Yellow for each of its vehicles. *Ibid.* The basis for its position was that it had sent the bill *for 1992 cab card stamps* to motor carriers before November 15, 1991. JA 7.

2. In August 1993, the American Trucking Associations filed a petition before the ICC asking the Commission to

[6] Because the SSRS provisions did not come into effect until the 1994 registration year, Yellow and other carriers were required to pay higher fees under Michigan's revised reciprocity system for the 1992 and 1993 registration years.

determine that several States were attempting to collect fees in violation of the ISTEA. The ICC instituted a declaratory order proceeding and solicited public comments. After evaluating the comments, the ICC issued interpretations of the statute. See *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Regulation*, 9 I.C.C.2d 1184 (1993).

The ICC resolved several questions that had been placed before it. Some States had expressed the intention of modifying or canceling reciprocity agreements that were in place as of November 15, 1991. Those States and state organizations asked the ICC to reconsider its prior conclusion "that the letter of the law mandated that States observe their reciprocity agreements when determining the fees they charged" as of November 15, 1991. *American Trucking Associations*, 9 I.C.C.2d at 1194. After considering the arguments raised by the States, the ICC decided to "reaffirm [its] prior conclusion" because "[t]he language of the statute is clear." *Ibid.* The ICC therefore reiterated its position that "States may not use a mechanism * * * that requires or results in the wholesale disavowal of all or part of any type of reciprocity agreement on which a fee was charged or collected as of November 15, 1991." *Ibid.*

The ICC also issued an interpretation of the statute to resolve Michigan's argument that the fees it collected and charged for the 1992 registration year — for cab card stamps effective February 1, 1992 — should be deemed to have been collected or charged before November 15, 1991. Yellow had called this argument to the ICC's attention in response to the agency's request for comments concerning attempts by SSRS States to raise fees above the levels they had charged based on reciprocity agreements. See 58 Fed. Reg. 48,673 (Sept. 17, 1993). The ICC made clear that Michigan's interpretation was contrary to the terms of the ISTEA:

> Yellow has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991[,]" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find.

American Trucking Associations, 9 I.C.C.2d at 1195. The ICC therefore granted the petition for a declaratory order in pertinent part. See *id.* at 1196.

D. Proceedings Below

After Michigan indicated that it would persist in charging a higher registration fee for the 1994 registration year than it had collected or charged as of November 15, 1991, Yellow paid the demanded fees under protest and filed suit in the Michigan Court of Claims for recovery of illegal fees. The parties cross-moved for summary judgment.

The Michigan Court of Claims recognized that the only issues before it were ones of statutory construction that had already been resolved by the federal agency entrusted with administering the statute. Thus, "[i]n interpreting the intent of [C]ongress," the court understood that "it should give great weight to the interpretation of the law applied to the statute by the agency charged with its enforcement." JA 21. With this principle in mind, the court held that "the decision by the ICC * * * in the *American Trucking* case is dispositive of the issues to be decided here." *Ibid.* The court therefore granted Yellow's motion for summary judgment as to the refund it sought, and denied Michigan's motion.

Michigan appealed the judgment to the Michigan Court of Appeals. That court found Michigan's arguments to be precluded by the ICC's reasonable contrary interpretations of

the statute. With respect to Michigan's argument that the fees frozen in place as of November 15, 1991 should be the fees imposed by the State for the 1992 registration year, the court held that — at a minimum — the ISTEA was ambiguous on the issue. See JA 27. Recognizing that the ICC had resolved the point adversely to Michigan in the *American Trucking* proceeding, the court "conclude[d] that the agency's interpretation of the statute was reasonable" and hence entitled to deference. JA 28.

The court also rejected any suggestion that States should not be required to consider reciprocity agreements in determining the amount of fees "charged or collected as of November 15, 1991." JA 29. The court noted both that the ICC had interpreted the ISTEA to preclude such a reading of the statute during the *SSRS* proceeding and that the D.C. Circuit in *NARUC* had unanimously ratified the ICC's understanding of the statute. Although the court recognized that the *NARUC* "decision is not binding on this Court," it found the decision "persuasive" and decided to "adopt its ruling with regard to this issue." *Ibid.* The court therefore affirmed the judgment of the Michigan Court of Claims. JA 34-35.

Michigan then appealed to the Michigan Supreme Court. In a divided opinion, that court reversed the judgment, concluding that, "in determining the 'fee * * * collected or charged' under 49 U.S.C. 11506(c)(2)(B)(iv)(III), Michigan's reciprocity agreements are irrelevant." JA 40. Although the majority purported to recognize that agency interpretations of statutes ordinarily are entitled to deference, it disregarded the ICC's interpretation of the ISTEA because it concluded that "the plain meaning of the terms of the ISTEA is clear." JA 46. Stating that "[t]he ISTEA itself refers only to the fee collected or charged, and contains no reference to reciprocity agreements," the majority felt that it "must look not at the fees paid by plaintiff in any given year, but at the generic fee

Michigan charged or collected from carriers as of November 15, 1991." JA 47.

The majority found that the "generic fee" was the $10 base fee provided by the first sentence of Michigan's registration fee statute and did not include any reductions in that fee effected pursuant to the second sentence of that statute through reciprocity agreements. The majority therefore construed the phrase "fee * * * collected or charged" in the ISTEA to mean a fee that *could have been collected or charged* had the State not entered into a reciprocity agreement rather than the fee that was actually collected or charged. JA 47-49. For this reason, the majority found that the plain meaning of the statute compelled its interpretation, and it therefore refused to consider the contrary view of the statute adopted by the ICC, the unanimous D.C. Circuit panel in *NARUC*, and both of the Michigan lower courts. See JA 47.

Two justices dissented from the majority's analysis. Justice Kelly recognized that — by construing the ISTEA to refer to fees that could have been but were not collected — "the majority's interpretation of the ISTEA depends on addition to the statute of words not present there." JA 50. Justice Kelly further opined that the language of the statute certainly allowed a reasonable interpretation contrary to the "strained reading" of the majority and that the court therefore was required to defer to the ICC's interpretation. See JA 52.

Justice Cavanagh wrote a separate dissent, also taking the view that the statutory language was ambiguous. JA 52-59. Justice Cavanagh found that many of the dictionary definitions of the word "charged" precluded the majority's interpretation, although he believed that certain other definitions were arguably consistent with the majority view. See JA 55-58. Finding both interpretations of the statute reasonable, Justice

Cavanagh concluded that the court was obligated to defer to the ICC's reasonable view. See JA 58.

On January 22, 2002, this Court granted Yellow's petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below took a serious wrong turn away from both the clear statutory text and controlling principles of agency deference. In effect, the Michigan Supreme Court read the phrase "collected or charged" to mean "*could* have been collected or charged had the State used reciprocity policies that were *not*, in fact, in force." The court then compounded that error by refusing to defer to an agency construction of the statutory language that was more than reasonable. For these reasons, the decision below should be reversed.

A. At the outset, the Michigan court misread the ISTEA's language. The term "collected or charged" is most naturally read to mean *actually* collected from the fee payer. In reaching a contrary conclusion, the court below understood the statute to have in mind the so-called "generic fee" that would have been imposed on motor carriers by state law in the absence of state reciprocity policies or other waivers. That approach, however, tortures the statutory language beyond recognition. The ISTEA does not refer to "generic fees" or inquire what fees could have been authorized by — *but were not actually charged under* — state law; it looks, instead, to the fees that *were* "collected or charged." Indeed, the approach taken by the court below makes no logical sense, since Michigan's reciprocity policy was as much an element of state law as was the Michigan statute setting fees that would have been imposed in the absence of a reciprocity waiver.

B. If the case is not resolved in Yellow's favor by the plain language of the ISTEA, the statutory text surely is (from

Yellow's perspective) no worse than ambiguous. With the exception of the majority below, almost every neutral reader of the ISTEA — including the ICC, the D.C. Circuit, two Michigan lower courts, two dissenters on the Michigan Supreme Court, and the U.S. Departments of Transportation and Justice — has concluded that the statute may fairly be read to preclude States from disavowing reciprocity policies that were in effect on November 15, 1991. The statutory language therefore cannot be thought unambiguously to compel the holding below. In these circumstances, deference to the well-reasoned, thoroughly considered conclusion of the ICC is mandatory.

C. It should be added that an alternative argument, not adopted by the Michigan Supreme Court but advanced by respondents in opposing certiorari — that the fees "collected or charged as of November 15, 1991" should be deemed to be the fees charged for the *1992* registration year, if the bills *for* 1992 were sent and paid in advance of November 15, 1991 — also lacks merit. The statutory language is most naturally read as looking to fees that were charged to entitle vehicles to traverse the taxing State's roads on November 15, 1991; it is undisputed that Illinois base-plated trucks traveling Michigan's roads as of that date paid the State nothing at all. And again, if the matter is not settled by the plain statutory language, deference is due the ICC's well-reasoned conclusion that the ISTEA is directed at fees collected or charged for the 1991 registration year. Michigan's alternative argument therefore should be rejected as well.

ARGUMENT

A. The Michigan Supreme Court Erred In Holding That The Fee *Actually* Collected Or Charged Is Irrelevant In Determining The Fee "Collected Or Charged As Of November 15, 1991" Under The ISTEA

1. It should go without saying that the task of statutory construction "begin[s] with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 950 (2002) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If the meaning of the statutory language is clear, the inquiry should end and the statute should be enforced according to its terms. *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989). That principle is enough to dispose of this case, because the language of the ISTEA is entirely clear.

In the ISTEA, Congress expressly provided that the per-vehicle fee established by each State under the SSRS must "equal [] the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III). Read literally, the statute compels an inquiry into the *actual* fees that were being collected or charged for operations in mid-November of 1991 — which necessarily means that reciprocity agreements in place during that period must be taken into account.

Certainly, fees cannot be thought to have been "collected" if they were not actually paid because they were waived pursuant to a reciprocity agreement. Nor can such fees be said to have been "charged" within the ordinary meaning of the word. Imagine, for example, that the Acme Hardware Store has a list price for widgets of $10, but that Jane Purchaser buys a

widget on sale for $5. Ms. Purchaser surely would say, if asked upon leaving the store, that she had been "charged" $5 for the widget — and not that she had been "charged" $10 but actually had paid less because she had received a discount. Acme Hardware Store, for its part, would not say that it had "collected" $10 when it had received only $5. There is no reason to doubt that Congress used the words "collected" and "charged" in precisely this usual way.[7]

2. The Michigan Supreme Court nevertheless departed from this common sense approach. In the view of the court below, "reciprocity agreements are not relevant" in determining which fees are "collected or charged" within the meaning of the ISTEA. JA 49. As that court saw the question, "[w]e must look not at the fees paid by [Yellow] in any given year, but at the *generic fee* Michigan charged or collected from carriers as of November 15, 1991." JA 47 (emphasis added). The court therefore looked at the fee that would have been imposed by Michigan statute *in the absence of a reciprocity agreement* and concluded that, "[w]hile that fee may be waived, and thus not 'charged or collected,' *for a particular carrier* under a reciprocity agreement, such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991." JA 48

[7] This understanding also accords with the dictionary definition of the word "charge." The usual understanding of "charged" is: "To impose a duty, responsibility, or obligation on" or "[t]o set or ask (a given amount) as a price." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 322 (3d ed. 1992). The duty imposed by Michigan in 1991 on Illinois base-plated trucks was to pay nothing, and the amount asked as a price for registering such trucks was zero. Dissenting below, Justice Cavanagh suggested that some dictionary definitions arguably lead to a different conclusion, but in our view all the definitions point to the same answer.

(emphasis in original). The court concluded that this "generic fee" was the "clear focus" of the ISTEA.

This analysis, however, tortures the statutory language beyond recognition. The ISTEA does not refer to "generic fees" or ask what fees were authorized by — *but not actually charged under* — state law. The statute looks, instead, to the fees that were "collected or charged." And while reading "charged" to mean "could have been but weren't charged" might be a suitable approach to statutory construction somewhere through the looking glass, where a local lexicographer told Alice ("in rather a scornful tone") that "[w]hen *I* use a word * * * it means just what I choose it to mean — neither more nor less"[8] — it is not an appropriate method for interpreting a federal statute.

Not surprisingly, the approach taken below leads to absurd results. Assume, for example, that Michigan had entered into reciprocity agreements with each of the other States in the SSRS system. Its "generic fee" would remain $10, the maximum fee it theoretically could have imposed in the absence of its reciprocity agreements. But the State would not have received a single penny in revenue. To say that fees were "collected or charged" in such circumstances makes a mockery of the statutory language.

The Michigan court nevertheless expressed the view that "[t]he new 'fee system' [under the ISTEA] is based not on the fees collected from one individual company, but on the fee system that the state had in place on November 15, 1991." JA

[8] Lewis Carroll, THROUGH THE LOOKING-GLASS (AND WHAT ALICE FOUND THERE), in THE ANNOTATED ALICE 213 (ed. Martin Gardner 2000) (emphasis in original). Alice sensibly responded: "The question is, whether you *can* make words mean so many things." *Ibid.* (emphasis in original).

47. But this analysis misses the statutory point. The court was wrong even on its own terms, since the "fee system" in place in Michigan on November 15, 1991, *included* reciprocal fee waivers; Michigan's reciprocity policy was as much an element of state law as was the state statute setting the fees that would have been imposed in the absence of a reciprocity waiver. Compare Mich. Comp. Laws § 478.7(4), first sentence (providing that "[t]he annual fee * * * shall be $10.00") with Mich. Comp. Laws § 478.7(4), second sentence (providing that "[t]he commission may enter into a reciprocal agreement * * * and may waive the fee required under this subsection"). More fundamentally, the ISTEA specifically looks to whether fees were "collected or charged" on November 15, 1991. And it is undisputed, of course, that fees were not collected from or charged to carriers in Yellow's position.[9] The ISTEA thus does not require that Yellow be treated in any particularly advantageous way. Instead, the statute merely forbids Michigan from raising the fees that it collected or charged from each of the various categories of carriers that it itself had established.

3. The Michigan Supreme Court also predicated its holding that "Michigan's reciprocity agreements are not relevant in determining what fee was 'charged or collected' as of November 15, 1991" (JA 49) on its observation that "[t]he ISTEA itself refers only to the fee collected or charged, and contains no reference to reciprocity agreements." JA 47. This comment, however, adds nothing useful to the analysis.

It is true that the ISTEA does not explicitly refer to reciprocity agreements or other state-law restrictions on

[9] The Michigan Supreme Court itself acknowledged this point, recognizing that a "fee may be waived, *and thus not 'charged or collected'* for a particular carrier under a reciprocity agreement." JA 48 (emphasis added).

registration fees, but it is equally true that the ISTEA does not refer to the "generic fee" considered dispositive by the court below. What the ISTEA *does* refer to is the fee "collected or charged" by the State. Any reciprocity agreements in effect as of November 15, 1991 are essential to determining the fee the State actually collected or charged for operations on that date; the "generic fee" simply does not speak to that question.

Thus, the observation by the Michigan Supreme Court that the ISTEA does not specifically mention reciprocity agreements casts no light on the proper interpretation of the statute. The statute makes plain that the critical inquiry is the fee collected or charged for operations as of November 15, 1991, but it does not address any of the myriad details that might affect the amount actually collected or charged. The ISTEA does not mention the United States Postal Service, but the Michigan Supreme Court could not from that fact properly infer that only fees paid in person to the MPSC may be considered "collected or charged" within the meaning of the statute.

The Michigan Supreme Court accordingly erred in interpreting "the plain language of the statute" (JA 43) in a manner that construes "charged" to encompass situations in which a fee has been waived, and "collected" to encompass fees that could theoretically have been collected in the absence of a reciprocity agreement. Factors other than a State's generic fee must be consulted in determining the "fee * * * collected or charged as of November 15, 1991" under the ISTEA. For this reason, the decision below must be reversed.

B. At A Minimum, The ICC Was Not Unreasonable In Concluding That Reciprocity Agreements Must Be Considered In Determining The Fee A State "Collected Or Charged As Of November 15, 1991"

1. The conclusion that the decision below cannot be reconciled with the plain language of the ISTEA should, of course, be the end of the matter. But if there is any doubt about the clarity of the statutory language, the Court should defer to the analysis of the ICC, which concluded that reciprocity agreements must be taken into account in determining the fees that were "collected or charged" on November 15, 1991. Under settled principles, an agency's reasoned interpretation in such circumstances may be rejected only if it is plainly foreclosed by the statutory language. That surely is not the case here: if the ISTEA's plain terms do not settle the case in Yellow's favor, they are no worse than ambiguous on the point.

It bears emphasis that it is not only Yellow that reads the statute this way. Yellow's view of the ISTEA has been adopted by (1) the ICC — the agency Congress charged with administration of the statute — during two separate administrative proceedings (*SSRS* and *American Trucking*); (2) a unanimous panel of the D.C. Circuit — the federal appellate court most experienced in addressing questions of administrative law; (3) the Michigan Court of Claims; (4) the Michigan Court of Appeals; and (5) two justices of the

Michigan Supreme Court.[10] It seems doubtful that all of these authorities were dead wrong.

The sheer number of judges agreeing with the ICC's interpretation therefore should at least have caused the Michigan Supreme Court to acknowledge the possibility of ambiguity. Moreover, most of the judges addressing the question did not conclude that the ICC's interpretation was marginally within the parameters of the statutory language; several of them wholeheartedly endorsed the ICC's reading as the most natural. The D.C. Circuit found that "the language of the statute precludes" the position found to be unambiguously correct by the Michigan Supreme Court. *NARUC*, 41 F.3d at 729. And writing in dissent below, Justice Kelly concluded that the position taken by the majority of the Michigan Supreme Court required rewriting the statute. See JA 50 ("the majority's interpretation of the ISTEA depends on addition to the statute of words not present there"). A statute is ambiguous when reasonable minds could differ as to its meaning (see *ibid.*); if it is granted that the reading of the ISTEA offered by the court below is at all reasonable, that plainly is the case here.

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[10] Other disinterested parties also have arrived at the same common sense conclusion adopted by the ICC. The Solicitor General, of course, supported the grant of certiorari in this case, observing that "Congress did *not* cap fees at the level that States lawfully *could have* collected or charged in 1991." U.S. Br. 9 (emphasis in original). And the Department of Transportation noted in the comments it submitted to the ICC during the *American Trucking* proceeding that, "if the fee charged on November 15, 1991, was one set under a reciprocity agreement, it seems clear that such fee constitutes the highest fee chargeable. The relevance of the fee charged on November 15, 1991, * * * may not be evaded by the artifice of canceling or modifying the relevant agreement." *American Trucking Associations*, 9 I.C.C.2d at 1192.

In fact, the analysis used by the court below itself indicates that, from Yellow's perspective, the ISTEA is no worse than ambiguous. As we have noted, the Michigan Supreme Court inferred — from the absence of any reference to reciprocity agreements in the text of the ISTEA — that the statute should be construed to deem such agreements categorically irrelevant in calculating fees "collected or charged" under the statute. For reasons explained above, this approach is textually insupportable. But even if the absence of any statutory reference to reciprocity is thought relevant at all, it does not support the Michigan court's conclusion; to the contrary, as this Court recently made clear in an analogous context, "such silence * * * normally *creates* ambiguity. It does not resolve it." *Barnhart* v. *Walton*, 70 U.S.L.W. 4231, docket no. 00-937, slip op. at 5 (Mar. 27, 2002) (emphasis added).

2. If the ISTEA is ambiguous, established principles require that the ICC's interpretation be accorded the highest level of deference. In the ISTEA, Congress specifically directed the ICC to prescribe standards for the SSRS. See 49 U.S.C. § 11506(c)(1). It further specified that the ICC's standards "shall establish a fee system for the filing of proof of insurance [that] * * * will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv). Thus, Congress could not have been more clear in entrusting the application of the ISTEA in general — and the fee-freezing provision in particular — to the ICC.

When implementing Congress's directive, the ICC arrived at its interpretation of the ISTEA after conducting an extensive notice and comment period. During the process, the ICC received over 50 comments, including those from 10 carriers and carrier organizations, 30 States and state organizations,

seven insurers and insurer groups, two shipper groups, the United States Department of Transportation, and two consulting firms. See *Single State Insurance Registration*, 9 I.C.C.2d at 612 & App. A (Pet. App. 45a, 83a-84a). Only after this formal notice and comment procedure did the ICC issue its final regulation implementing the ISTEA's fee-freezing provision (see 49 C.F.R. § 367.4(c)(4)(ii)) and conclude that both "the letter of the law" and "the intent of the law" compel the conclusion that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991." *Single State Insurance Registration*, 9 I.C.C.2d at 618 (Pet. App. 53a, 54a).

In promulgating its standards and its interpretations of the statute necessary to support those standards, the ICC recognized the danger that allowing States to circumvent their reciprocity agreements could impair interstate commerce. Congress had explicitly stated in the ISTEA that any State fees imposed contrary to the ICC's standards would impermissibly burden interstate commerce. See 49 U.S.C. § 11506(c)(2)(C). From comments provided during the rulemaking process, the ICC understood that "States could realize windfall revenue gains from selective or wholesale rescission of reciprocity agreements." *Single State Insurance Registration*, 9 I.C.C.2d at 618 (Pet. App. 53a). The ICC pointed to a "worst case scenario" in which "State revenues could increase from $50 million to $200 million, inconsistent with the spirit of the ISTEA." *Ibid.* In large part to avoid an impermissible burden on interstate commerce, the ICC "concluded that participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991, as required by § 11506(c)(2)(B)(iv)." *Id.* at 618-619 (Pet. App. 54a).

The ICC's construction of the statute it had been entrusted to administer was further endorsed when several States and organizations of States challenged its ruling on the reciprocity agreement issue in an appeal to the D.C. Circuit. The D.C. Circuit panel unanimously adopted the ICC's reading of the ISTEA, finding that "the plain language of the statute precludes [any contrary] interpretation." *NARUC*, 41 F.3d at 729.

Against this background, the ICC's interpretation of the ISTEA is entitled to substantial deference. This Court established the now-familiar rules of judicial deference to administrative pronouncements in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Under those rules, judicial deference to an administrative construction of a statute is at its zenith when — as here — Congress has directed an agency to promulgate rules or standards concerning a statute it has been charged to administer:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843-844.

This Court recently reaffirmed the *Chevron* framework, explaining that administrative rulings may encounter "a spectrum of judicial responses, from great respect at one end to near indifference at the other." *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted). After reiterating the extensive deference to be accorded an agency when Congress has explicitly entrusted interpretation of a statute to

the agency (see *id.* at 227), the Court pointed to another factor that will trigger extraordinary deference:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

Id. at 230. Thus, under this Court's precedents, administrative interpretations of a statute are subject to maximal judicial deference when (1) Congress has explicitly entrusted interpretation of the statute to the agency, and (2) the agency has engaged in formal administrative procedures before arriving at its interpretation.

As we have just described, both of those factors are present in this case. Congress expressly commanded that "the Commission shall prescribe amendments to the standards" in order to create the SSRS. 49 U.S.C. § 11506(c)(1). In giving effect to that congressional command, the ICC engaged in the full panoply of administrative procedures before issuing the amended standards. As a result, the ICC's interpretation of the ISTEA in this case must be afforded the highest level of judicial deference; it is subject to reversal by a reviewing court only if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; accord *Mead Corp.*, 533 U.S. at 227. For reasons we have explained, that is not the case here.

3. Moreover, the reasonableness of the ICC's interpretation is strongly supported by the undisputed legislative purposes of the ISTEA. Under the logic of the decision below, every State participating in the SSRS would be within its rights to rescind its reciprocity agreements and to collect the maximum "generic

fee" of $10 per vehicle. That outcome would impose massive financial burdens on interstate motor carriers, in a manner manifestly inconsistent with Congress's intent. In passing the ISTEA, Congress intended that the new system "benefit the interstate carriers" by reducing the carriers' costs of complying with state fee requirements. See H.R. Conf. Rep. No. 102-404, 102d Cong., 1st Sess. 437 (1991), reprinted in 1991 U.S.C.C.A.N. 1817. In the course of engaging in the extensive administrative process envisioned by Congress, the ICC learned that allowing States to rescind their reciprocity agreements could deal a devastating blow to interstate commerce by *quadrupling* — from $50 million to $200 million — the fees paid by interstate motor carriers. See *Single State Insurance Registration*, 9 I.C.C.2d at 618 (Pet. App. 53a).

The Michigan Supreme Court, of course, never gave any thought to these concerns. By substituting its own idiosyncratic view for the reasoned interpretation adopted by the agency charged by Congress to administer the ISTEA, the court below thwarted congressional intent and intolerably burdened interstate commerce. The Michigan Supreme Court erred in failing to defer to the reasonable interpretation of the statute adopted by the ICC, and the decision below must therefore be reversed.

C. The Fees Michigan Imposed For The 1992 Registration Year Were Not "Collected Or Charged As Of November 15, 1991"

Respondents devoted virtually their entire Brief in Opposition (*e.g.*, 1, 15-26) to defending the Michigan Supreme Court's decision on a ground not addressed by the court below. Indeed, so uncomfortable were respondents with the "generic fee" concept forming the basis for the judgment in their favor that their primary argument in opposition to the petition for

certiorari in this case was that "the Michigan Supreme Court * * * reached the proper result in this case *for reasons other than stated in its opinion*." Brief in Opposition at 1 (emphasis added). But any reasons left unstated in the Michigan Supreme Court's opinion are no more valid than its stated reasons, and respondents' alternative argument accordingly does not provide a basis for affirmance here.

Michigan's argument was based on the timing of its administrative procedures for imposing registration fees for the *1992* registration year. It is undisputed that for the 1991 registration year — which included November 15, 1991 — Michigan charged a fee of zero to vehicles base-plated in Illinois. Beginning in the 1992 registration year, Michigan changed its basis of reciprocity from the base-plating system to the principal-place-of-business system. Thus, carriers whose principal place of business was Kansas but whose vehicles were base-plated in Illinois, and who sought to operate in Michigan beginning February 1, 1992, were required to pay a fee of $10 per vehicle. According to Michigan, however, its 1992 fee qualifies as having been "collected or charged as of November 15, 1991" because the State *sent out the bill for the 1992 registration year* in September of 1991 and because certain carriers (including Yellow) voluntarily submitted their payments for the 1992 registration stamps before November 15, 1991.

This argument, however, cannot be squared with the plain language and clear policy of the ISTEA. In limiting fees to those "collected or charged as of November 15, 1991," the statute is most naturally read as looking to the fees that were charged to entitle vehicles to traverse the taxing State's roads on that date. And it is, again, undisputed that Illinois base-

plated trucks traveling on Michigan's roads as of November 15, 1991, paid the State nothing at all.

In addition, Michigan's alternative argument runs afoul of the deference due a reasonable interpretation of the statute by the agency charged with administering it. As we have previously noted, the ICC made clear in the *American Trucking* proceeding that Michigan's argument was contrary to the terms of the ISTEA:

> Yellow has raised the issue of whether the statutory language concerning the "fee charged or collected as of November 15, 1991[,]" relates to fees charged for the 1991 registration year or for the 1992 registration year. *We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find.*

American Trucking Associations, 9 I.C.C.2d at 1195 (emphasis added). Under the settled principles of administrative law we have previously discussed (*supra*, at 22-25), this interpretation must be accorded the highest level of judicial deference. Again, Congress expressly entrusted the ISTEA and its fee-freezing provision to the ICC, and the ICC issued its interpretation in *American Trucking* only after invoking the APA's notice and comment procedures.

The ICC's interpretation of the statute must be accepted as authoritative. Interpreting the phrase "collected or charged as of November 15, 1991" to refer to the fees collected or charged to conduct operations as of November 15, 1991 is the most natural reading of the statutory language. And it avoids the danger that States could evade or manipulate the ISTEA by rushing to announce prospective fee changes prior to the statute's effective date, or the possibility that the permissibility of the fee for a particular carrier could turn on whether the fee-

payer's check was delayed in the mail. At an absolute minimum, it is a reasonable interpretation of the ISTEA that is entitled to deference from a reviewing court.

Undoubtedly for that reason, none of the Michigan courts was willing to adopt Michigan's argument as a basis for ruling in its favor. The fees Michigan charged for cab card stamps effective February 1, 1992 were not "collected or charged as of November 15, 1991." Michigan's argument accordingly does not provide an alternate basis for affirming the decision below.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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APRIL 2002

Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

(8)

No. 01-270

In the Supreme Court of the United States

October Term, 2001

YELLOW TRANSPORTATION, INC.,

Petitioner,

v

STATE OF MICHIGAN, *ET AL*,

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

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QUESTION PRESENTED

Whether the Michigan Supreme Court erred in holding that, under 49 USC 11506(c)(2)(B)(iv)(III) (1994) and 49 USC 14504(c)(2)(B)(iv)(III) (Supp V 1999), only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

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STATEMENT OF THE CASE

1. Congress enacted the Motor Carrier Act of 1935, as amended, 49 USC 301 *et seq*, to provide for limited state regulation of interstate commercial transportation. Through subsequent amendments, States were authorized to register interstate motor carriers, subject to supervision of the Interstate Commerce Commission ("ICC"). Under a registration program that began in 1965, States choosing to participate were allowed to charge up to $10 for each vehicle registered. As proof of registration each State issued each vehicle a stamp for each vehicle that was placed in the appropriate spot on "bingo cards" carried in the cab of each vehicle.

2. The Michigan Public Service Commission ("MPSC") began issuing bingo card stamps to interstate, foreign and exempt interstate motor carriers in 1989 pursuant to 1988 PA 347 ("Act 347"). Act 347 authorized the MPSC to begin charging fees for each vehicle of interstate motor carriers. See, Michigan Compiled Law ("MCL") 478.7(4). Additionally, Act 347 permitted the MPSC to enter into reciprocity agreements with other states that did not charge vehicles licensed in Michigan.

3. The interstate fees collected by Michigan pursuant to MCL 478.7(4), and authorized under 49 USC 14504(c)(2)(B)(iv)(III), are earmarked to fund extensive motor carrier safety activities in Michigan. In MCL 478.7(4), the Michigan Legislature provided that:

> Of the fees collected pursuant to this section, not less than 90% of those fees in excess of $1,400,000.00 annually shall be deposited in the truck safety fund established in Section 25 of Act No. 51 of the Public Acts of 1951, being section 247.675 of the Michigan Compiled Laws.

MCL 247.675 funds the creation of the Michigan truck highway safety commission which has as it purposes, *inter alia*

establishment of truck driver safety education programs, MCL 247.675(4)(b)(i); coordinating and administering grants for research and demonstration projects to develop the application of new ideas and concepts in truck driver safety education, MCL 247.675(4)(d)(i); and, investigating and making recommendations on the truck safety enforcement procedures of local law enforcement agencies, MCL 247.675(4)(d)(ii). In 2001, the MPSC collected approximately $2.7 million in fees pursuant to MCL 478.7(4) which resulted in approximately $1.2 million in funding for the Michigan Truck Safety Commission.

4. As of 1991, 38 States, including Michigan, participated in this registration system. Some States entered into reciprocal arrangements under which they would discount or waive the fee for carriers based in each other's State. Most States used the motor carrier's principal place of business as the basis for determining reciprocity. The MPSC, however, used the State in which the vehicle was base-plated, i.e., where it was registered or license-plated, as the basis for determining reciprocity. Under this approach, for registration years 1990 and 1991, the MPSC did not charge a fee for vehicles base-plated in a State that did not charge a fee for vehicles that were base-plated in Michigan.

5. Early in 1991 the MPSC determined that granting reciprocity using base-plating, rather than place of business, was unduly complex, inefficient to administer, and inconsistent with the registration system used by virtually all other states. See Affidavit of Thomas R. Lonergan, JA 6-7. For example, vehicles operated by a single motor carrier but base-plated in several different States required several different calculations. *Id.* This significantly increased the possibility of error in reciprocity waivers. *Id.*

6. Contemporaneously, in 1991 Congress was considering legislation to streamline the state registration system. Recognizing that such legislation could include a mandatory uniform approach by participating States and to be consistent with other States, the MPSC decided to terminate its

use of base-plating as the method of determining reciprocity in favor of the "principal place of business" method of determining reciprocity. JA 7.

7. Rather than immediately implementing this change in early 1991, the MPSC decided, for the convenience of the motor carrier companies, to implement the change in the fall of 1991 when the annual renewals occurred. JA 7.

8. On December 18, 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), PL 102-240, 105 Stat 1914-2207, that included Section 4005, "Single State Registration System" (SSRS). 105 Stat 2146-2148. 49 USC 14504(c).[1] The SSRS created a streamlined system for the registration of a motor carrier's vehicles engaged in interstate commerce. Previously, motor carriers were required to separately register their vehicles in each State within which those vehicles operated. The SSRS replaced this process with a single state filing system in which a motor carrier would only file in and submit a single payment to the state in which it had its principal place of business. Basically, the carrier would submit a single application that would indicate the states and number of interstate vehicles to be operated in such states.[2] That single filing and payment would then cover vehicle registrations and fees for all states where the motor carrier operated vehicles. The state in which the motor carrier has its principal place of business would then forward the registrations and fees to all other states where such vehicles are operated.

9. Although enacted in 1991, the SSRS was not implemented until January 1, 1994. 105 Stat 2148. The SSRS provided that the ICC was to prescribe standards for the SSRS.

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[1] Section 4005 of ISTEA was originally codified as 49 USC 11506 and subsequently recodified in 1995 as 49 USC 14504. As to the subsection of the SSRS that is at issue in this case the Respondents use the current U.S. Code cite of 49 USC 14504(c)(2)(B)(iv)(III) throughout the brief.

[2] An example of such a form is contained in the appendix to the Respondents' Brief in Opposition at pages 25b-31b. (Res. App., pp 26b-31b).

With respect to the fee system under the SSRS, Congress provided:

> (B) Receipts; fee system. Such amended standards—
>
> > (iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.* (49 USC 14504(c)(2)(B)(iv)(III)); (emphasis added.)

10. In September 1991, two months prior to the November 15, 1991 date specified in 49 USC 14504(c)(2)(B)(iv)(III), Michigan mailed renewal interstate application forms to motor carriers for the 1992 registration year. Res. App., p 25b. On the back of the application form were instructions which stated that "[t]he cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations." Res. App., p 28b. The amount of fees appropriate to a motor carrier's fleet was determined by reference to an accompanying chart identifying cab card stamp fees. Res. App., p 30b.

11. No change was made to Michigan's registration fee of $10.00 per vehicle, as authorized by MCL 478.7(4). Nor was there any change to Michigan's long-standing practice of collecting renewal fees in the fall for registration in the upcoming year, as is the practice with most, if not all, other

States.[3] Moreover, there was no change in the States with which Michigan had reciprocity. The only change was the basis for determining reciprocity, i.e. the fee would be determined on the motor carrier's principal place of business rather than on the license plating of a particular vehicle. The result was that some carriers that previously had the fee waived under the base-plating methodology paid the $10 fee, while others that had not had the fee waived under base-plating would have the fee waived under the principal place of business methodology.

12. One carrier affected by this change was the Petitioner. In the calendar years 1990 and 1991, Petitioner had 3,730 vehicles base-plated in Illinois and Indiana. Under the base-plating method of determining reciprocity that the MPSC had followed at that time, Petitioner was not charged for those bingo card stamps as those States did not charge fees for vehicles base-plated in Michigan. See Affidavit of Thomas R. Lonergan, JA 7-8. After the MPSC changed its method for determining reciprocity based on a company's principal place of business, Petitioner paid a $10.00 per vehicle registration fee for all its vehicles, as its principal place of business was in Kansas, and Michigan had no reciprocity with the State of Kansas. Res. App., p 26b. The application form for the 1992 registration year was mailed to Petitioner in September 1991. The application form was returned on October 3, 1991 with payment in full. Res. App., p 25b.

13. On March 24, 1995, the Petitioner filed its complaint in the Michigan Court of Claims against the Respondents State of Michigan, the Michigan Department of Treasury and its State Treasurer, Michigan Department of Commerce and its Director, the Michigan Public Service

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[3] In fact, the SSRS procedures manual states that registrants must file an application for registration and pay fees no earlier than August 1 and no later than November 30 of each year for the upcoming year. Copies of the SSRS Procedures Manual have been lodged with the Clerk.

Commission and its Commissioners.[4] The Petitioner's complaint claimed that the Respondents had unlawfully collected registration fees on its trucks that traveled in interstate commerce, in violation of the federal Single State Registration System. 49 USC 14504(c)(2)(B)(iv)(III). Motions for summary disposition were filed by the Petitioner and Respondents. The Court of Claims denied Respondents' Motion but granted Petitioner's Motion. Appendix JA 19-22. The Court of Claims found that an ICC decision in *American Trucking Ass'ns – Petition for Declaratory Order – Single State Ins Registration,* 9 ICC2d 1184 (1993) was to be accorded deference and, based on a finding in that case, the Court ordered that the registration fees for the years 1994 through 1996 be refunded to Petitioner. JA 22. The Court of Claims then entered a judgment that ordered the payment of $99,580.00, plus interest, for fees paid for 1994, 1995 and 1996.

14. The Respondents appealed the Court of Claims' decision to the Michigan Court of Appeals. On August 14, 1998, in a split decision, the Court of Appeals affirmed the Court of Claims. *Yellow Freight Systems, Inc v Michigan,* 231 Mich App 194; 585 NW2d 762 (1998). JA 23-38. The majority opinion found that because 49 USC 14504(c)(2)(B)(iv)(III) did not reveal congressional intent, the

[4] It should also be noted that the Petitioner is not the only motor carrier to contest the Respondents' collection of registration fees under the SSRS. Schneider National Carriers, Inc. ("Schneider") sought recovery of the payment of registration fees in *Schneider National Carriers, Inc, et al v State of Michigan,* Court of Claims No. 96-16473-CM. Schneider's challenge mirrored the one advanced by Petitioner in this action. On November 24, 1997, the Court of Claims issued an Opinion and Order dismissing the complaint, holding that the fees collected by the State Defendants did not violate 49 USC 14504(c)(2)(B)(iv)(III). Schneider appealed the decision to the Michigan Court of Appeals which initially reversed the Court of Claims in an unpublished opinion due to the Michigan Court of Appeals holding in *Yellow Freight,* 231 Mich App 194. Following the Michigan Supreme Court's decision in *Yellow Freight,* the Court of Appeals affirmed the Court of Claims. Schneider has since filed an application for leave which is currently pending before the Michigan Supreme Court.

Court should defer to an interpretation given by the ICC in *American Trucking Ass'ns supra* and affirmed the Court of Claims. The dissent found no ambiguity in 49 USC 14504(c)(2)(B)(iv)(III), instead finding that the statutory language should be applied "according to its plain meaning and not according to the ICC's strained construction." 231 Mich App at 209. JA 35. The dissent stated that the ambiguity that the majority found was the result of the majority's failure to accept the statutory wording at face value. 231 Mich App at 210. JA 36. The dissent then stated, "[w]hen a statute is clear on its face, judicial construction is unnecessary and inappropriate." *Id.* JA 36.

15. The Michigan Supreme Court in a split decision reversed the Michigan Court of Appeals. *Yellow Freight System, Inc v Michigan,* 464 Mich 21; 627 NW2d 236 (2001). JA 39-59. Five Michigan Supreme Court justices examined 49 USC 14504(c)(2)(B)(iv)(III) and, based on its plain language, held that reciprocity agreements were not relevant to determining what fee was collected or charged by Michigan on November 15, 1991. JA 39-49. It found that the focus of 49 USC 14504 was not on what any particular carrier was charged but rather on the states' generic fee as of November 15, 1991. JA 48.

16. The Petitioner then filed a Petition for Certiorari that was granted by this Court on January 22, 2002.

SUMMARY OF ARGUMENT

The Michigan Supreme Court correctly decided that the plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) authorizes the Respondents to continue to charge a $10 per vehicle fee under the SSRS program because that fee was collected or charged by Respondents as of November 15, 1991. The argument of Petitioner and its *amici* that reciprocity agreements must be considered when determining the maximum fee that may be charged to a particular carrier under the SSRS program has no foundation in the plain language of 49 USC 14504(c)(2)(B)(iv)(III), which makes no mention of reciprocity agreements. As the Michigan Supreme Court properly noted, the focus of the statute is the per vehicle fee under state law as of November 15, 1991 and not on whether that fee was charged to or collected from a particular carrier. The Michigan Supreme Court's reading finds support in both the text of 49 USC 14504(c)(2)(B)(iv)(III) when read as a whole and its legislative history. Moreover, the Michigan Supreme Court's decision results in a statutory scheme that is coherent and consistent in that it properly reflect Congress' intent in balancing the interests of States and motor carriers while facilitating a State's continued participation in the SSRS program.

Because the Michigan Supreme Court found the language in 49 USC 14504(c)(2)(B)(iv)(III) to be plain and unambiguous, it did not reach the second step in the analysis under *Chevron USA, Inc v Natural Defense Council, Inc*, 467 US 837 (1984), which is to determine whether the agency's interpretation of the statute is permissible. Here, the ICC's construction is not an interpretation, it is a rewrite. The ICC's interpretation is not permissible because it results in multiple fees per state, imposes a cap less than the $10 cap imposed by Congress, and prevents Michigan from charging the $10 per vehicle fee, even though Michigan actually collected and charged a $10 per vehicle fee as of November 15, 1991.

ARGUMENT

In *Chevron USA, Inc v Natural Resources Defense Council, Inc*, *supra*, this Court established that when interpreting a statute, the Court must first determine "whether Congress has directly spoken to the precise question at issue." 467 US at 842. If so, and "the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 US at 842. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." 467 US 843.

The Michigan Supreme Court found that 49 USC 14504(c)(2)(B)(iv)(III) was clear and unambiguous and applied the statute as written. An analysis of the Michigan Supreme Court's decision and findings establishes that the Michigan high court correctly decided the matter. Although the Michigan Supreme Court did not reach the second step of the *Chevron* analysis, it is nonetheless clear that the ICC's interpretation is not based on a permissible construction of 49 USC 14504(c)(2)(B)(iv)(III).

A. THE MICHIGAN SUPREME COURT CORRECTLY RULED THAT THE REGISTRATION FEES CHARGED TO AND COLLECTED FROM CARRIERS, AS OF NOVEMBER 15, 1991, PURSUANT TO MCL 478.7(4) ARE AUTHORIZED BY THE PLAIN AND UNAMBIGUOUS LANGUAGE OF 49 USC 14504(c)(2)(B)(iv)(III).

The precise issue in this case is the meaning of 49 USC 14504(c)(2)(B)(iv)(III). Under that statutory provision the ICC was to prescribe standards for a fee system that:

> . . .will result in a fee for each participating state that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.

In determining whether the MPSC lawfully collected a $10 per vehicle fee from the Petitioner under the SSRS, the Michigan Supreme Court made a number of key determinations. First, it held that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements. JA 47. Second, it held that because 49 USC 14504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system", the statute's focus is not on the fees collected from one individual company, but rather on the fee system that the State had in place on November 15, 1991:

> The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the State had in place on November 15, 1991. (JA 47.)

Thus, the Michigan Supreme Court concluded:

> We must look not at the fees paid by Plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991. (JA 47.)

The Michigan Supreme Court then determined what was the registration fee that Michigan charged pursuant to Michigan law on November 15, 1991 by analyzing MCL 478.7(4), the applicable state law, as follows:

> To determine what registration fee Michigan charged on November 15, 1991, we examine M.C.L. § 478.7(4); MSA 22.565(1)(4) in the Motor Carrier Act. Since 1989 that statute has provided for a fee of $10 to be charged for those motor carrier vehicles operating in Michigan and licensed in another state or province of Canada:
>
> > The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00.

> The same statute, M.C.L. § 478.7(4); MSA 22.565(1)(4), also gives the commission the ability to waive the $10 fee under certain circumstances:
>
> > The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection. (JA 47-48.)

Based on its reading of MCL 478.7(4), the Michigan Supreme Court determined that the fee charged by Michigan as of November 15, 1991 was $10.00. The Michigan Supreme Court explained its decision, saying:

> Thus, under M.C.L. § 478.7(4); MSA 22.565(1)(4), the fee charged as of November 15, 1991, was $10. While that fee may be waived, and thus not "charged or collected," *for a particular carrier* under a reciprocity agreement, such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. 11506(c)(2)(B)(iv)(III) is on the generic "fee" that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier.
>
> The ICC's position that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov. 15, 1991, as required by § 11506(c)(2)(B)(iv)," added a concept not within the express language of the statute. It added consideration of voluntary agreements between the states to

> waive or reduce the fees imposed. It is not for the ICC, or this Court, to insert words into the statute. (JA 48-49; footnote omitted.)

When the Michigan Supreme Court's decision and findings are analyzed, it is clear that they are correct.

1. The focus of 49 USC 14504(c)(2)(B)(iv)(III) is not on what a particular carrier paid but on whether a per vehicle fee was charged or collected by the State on November 15, 1991.

The Petitioner claims that the fee that Congress permits the States to continue to collect or charge under 49 USC 14504(c)(2)(B)(iv)(III) is the fee that was "actually collected" by the State on November 15, 1991. The Petitioner further argues that the "actually collected" fee is carrier specific. That is, a state may not henceforth collect or charge a $10 fee from a carrier unless it collected or charged that $10 fee from that particular carrier as of November 15, 1991. The problem with this argument, as the Michigan Supreme Court recognized (JA 48-49), is that it adds a concept not contained in the express language of the statute.

The plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) is that if a State collected or charged the $10 fee as of November 15, 1991, it may continue to do so. The statute does not require that the $10 fee was collected from or charged to all carriers. Nor does 49 USC 14504(c)(2)(B)(iv)(III) provide that the $10 fee had to be collected from a particular carrier as of November 15, 1991 for the State to be able to charge a particular carrier the $10 fee under the SSRS. The focus of the statute is on the actions of the State, not on the actions of any particular carrier. It is undisputed that Michigan collected and charged a $10 fee from motor carriers at all relevant times. Accordingly, Respondents may continue to charge up to $10 per vehicle under 49 USC 14504(c)(2)(B)(iv)(III).

The Petitioner, however, seeks to rewrite 49 USC 14504(c)(2)(B)(iv)(III) to add the following emphasized words:

> (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected *from* or charged *to each carrier* as of November 15, 1991.

The focus of the actual text, however, is upon the State, not the carrier. A review of the entire text of 49 USC 14504 also supports the Respondents' reading of the statute.

In a subsection preceding the subsection at issue, Congress specifically states that the fee system is to be:

> based on the number of commercial motor vehicles the *carrier* operates in a State and on the number of States in which the *carrier* operates. (49 USC 14504(c)(2)(B)(iv)(I); emphasis added).

As this Court recently noted in *Barnhart v Sigmon Coal Co*, 534 US 438; 122 S Ct 941 (2002):

> [I]t is a general principle of statutory construction that when "Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v United States*, 464 US 16, 23 (1983) (quoting *United States v Wong Kim Bo*, 472 F2d 720, 722 (CA 5, 1972). (534 US 438; 122 S Ct at 951).

If Congress intended that the State's authorized fee be whatever was collected from or charged to a particular carrier, the word "carrier" would have appeared in the subsection at issue, 49 USC 14504(c)(2)(B)(iv)(III). The fact that it does not, creates the presumption that Congress purposely excluded the word "carrier," since the focus was on whether a per-vehicle fee was collected or charged by the State.

The Respondents' reading of 49 USC 14504 is also in line with the legislative history of the SSRS. In an earlier

version of the SSRS, the method chosen to offset the loss of revenues to the States due to the implementation of the SSRS was through federal grants. This was noted in H R Rep No. 102-171(I), p 115, as follows:

> Section 406. State Registration
>
> Section 406 amends section 11506 of title 49 U.S.C.
>
> Subsection 406(a) provides that effective January 1, 1994 states are prohibited from requiring motor carriers regulated by the Interstate Commerce Commission to file certificates or permits with the states in which they operate. It further eliminates the requirements for displaying a decal to indicate the possession of such a permit or certificate or the collection of a fee for such registration or decals.
>
> States may continue the practice of requiring motor carriers to file and maintain proof of insurance.
>
> Subsection 406(b) authorizes the Secretary to make grants to states to offset revenues lost as a result of subsection (a). *A state is eligible if it had imposed and collected fees in 1991.* The funding is established at $50 million for fiscal year 1994. Reimbursement is for one year only. (reprinted in 1991 USCCAN at 1641; emphasis added.)

The method chosen to reimburse the States was later changed to its present wording by the Conference substitute. This was noted in H R Conf Rep No. 102-404, p 438, as follows:

> The new fee system is to be based upon the number of vehicles which a carrier operates in a state and the number of states in which that carrier operates. States will not be allowed to charge a greater fee under Section 405 than the fee they charged under the former program as of November 15, 1991. The fee cannot exceed $10 per vehicle under any circumstances.
>
> The Conference version of Section 405 does not authorize any funds to be distributed to the states from the Highway Trust Fund. (reprinted in 1991 USCCAN at 1818.)

As reflected above, the clear and consistent focus of Congress, both in the earlier bill and after the House Conference Report, when it was devising a method to reimburse the States for lost revenues was whether the State was collecting or charging a fee in 1991. Whether a State would be permitted to charge a vehicle fee under the SSRS was not determined on whether a particular carrier paid a fee in 1991 or what that fee may have been.

The flaw in Petitioner's interpretation of 49 USC 14504 which would render the State's fee to be carrier specific was succinctly described by the Michigan Court of Claims in a companion case,[5] as follows:

> The fact that an individual carrier was not assessed fees one year and was assessed fees the next year is irrelevant. The determining factor is location and is not focused on the individual carrier's mere existence. This narcissistic argument produces absurd results. It is a basic rule of statutory construction carried over from common law that absurd results should be avoided. *Fortunate v. Dept. of Transp.*, 449 Mich 991; 538 N.W.2d 669 (1995). If, for example, a carrier expands operations into the State of Michigan after November 15, 1991,

[5] As noted in the Statement of the Case, the Respondents' collection of registration fees under the SSRS was also challenged in *Schneider Motor Carriers, Inc, et al v State of Michigan.* The Michigan Court of Claims in that case, however, rejected the claim that the Respondents' collection of SSRS fees violated federal law.

then the State will be forever precluded from assessing a fee because the State did not previously assess a fee against that carrier's vehicles. Even more absurd is the situation where a carrier was not yet in existence as of November 15, 1991. In that case, all participating states would be precluded from assessing fees against that carrier because it never paid fees to any state prior to November 15, 1991. These possible results are contrary to the legislative intent of creating a fee system for the filing of proof of insurance. (*Schneider Motor Carriers, et al v State of Michigan,* November 24, 1997 Opinion. Michigan Court of Claims Docket No. 96-16473-CM. Res. App., pp 12b-13b.)

The Petitioner's interpretation of 49 USC 14504(c)(2)(B)(iv)(III) also creates practical problems. For example, what occurs if a carrier subsequently changes its principal place of business from a State that enjoys reciprocity to one that does not. Under the arguments of the Petitioner and its *amici,* a carrier changing its principal place of business from one state enjoying reciprocity to another State not having reciprocity would presumably result in an increase in the fees that were charged to that particular carrier as of November 15, 1991 and therefore in violation of 49 USC 145404(c)(2)(B)(iv)(III). Additionally, as noted *infra,* Congress directed the ICC to establish a single fee for each participating state. If that fee was based on what a particular carrier paid, the result would be the establishment of multiple fees, which is not what Congress mandated. Thus, the text of 49 USC 14504, when read as a whole, does not support the interpretation that Petitioner and its *amici* ascribe to it.

The plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) is that if a State collected or charged a $10 fee as of November 15, 1991, it could collect a $10 fee per vehicle under the SSRS. The requirement is a general one and is not specific to a particular carrier. Inasmuch as Respondents

had a registration fee system that collected and charged $10 per vehicle in place at all relevant times (including the 1991 calendar year) the Michigan Supreme Court correctly found that Respondents' actions fully comply with 49 USC 14504(c)(2)(B)(iv)(III).

2. The SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements.

The Michigan Supreme Court's finding that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements is undeniably true. If Congress believed that reciprocity agreements were to be taken into account when determining what the state fee was as of November 15, 1991, it would have so provided. The Petitioner dismisses this finding of the Michigan Supreme Court saying it adds nothing useful to the analysis. Petitioner's brief, p 18. The Petitioner instead attempts to divert attention away from this point by arguing that the "critical inquiry is the fee collected or charged for operations as of November 15, 1991" and not "any of the myriad details that might affect the amount actually collected or charged." Petitioner's brief, p 19.

However, the Petitioner's and its *amici's* arguments that portray Congress's failure to refer to reciprocity agreements as nothing more than one detail among many that did not merit the attention of Congress, or that the express language chosen by Congress had a much broader effect than the words themselves would plainly indicate, are reminiscent of arguments that were rejected by this Court in *Artuz v Bennett,* 531 US 4 (2000) and *National Cable Telecommunications Ass'n, Inc v Gulf Power Co, et al,* 534 US 327; 122 S Ct 782 (2002).

In *Artuz,* the issue before this Court was whether an application for state post-conviction relief containing claims that are procedurally barred is "properly filed" within the

meaning of 28 USC 2244(d)(2).[6] The Petitioner in that case contended that an application for post-conviction or other collateral review was not "properly filed" for the purposes of 28 USC 2244(d)(2) unless it complied with all mandatory state-law procedural requirements that would bar review of the merits of the application. 531 US at 8. In a unanimous decision this Court disagreed, noting that in common usage, the question whether an application has been "properly filed" is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar. *Id,* 531 US at 9. Ignoring this distinction, this Court reasoned, would then require judges to engage in verbal gymnastics when an application contained some claims that are procedurally barred and some that are not. *Id,* 531 US at 10. This Court then concluded, saying:

> Presumably a court would have to say that the application is "properly filed" as to the nonbarred claims, and not "properly filed" as to the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can both be "properly filed" and not "properly filed." (531 US at 10.)

This case, like *Artuz,* similarly adds a condition that is not contained in the language of the statute. The Petitioner in this case asks that the word "fee" in 49 USC 14504(c)(2)(B)(iv)(III) be interpreted to necessarily include "reciprocity agreements" even though that statutory provision does not contain such language. Moreover, the Petitioner asks this Court to perform a similar feat of verbal gymnastics. The word "fee", as that term is commonly understood, is a fixed

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[6] The pertinent language of 28 USC 2244(d)(2) provides:

> "... the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

charge or sum paid for services. See, Black's Law Dictionary, 553 (5th ed. `1979) (defining "fee" as "a charge fixed by law for services of public officers or for use of a privilege under control of government"). It is the Petitioner's argument that Michigan, under the SSRS, is authorized to collect a $10 per-vehicle fee from those carriers that paid a $10 fee to Michigan in 1991, but that a zero dollars fee, under the SSRS, applies to carriers that did not pay a $10 fee to Michigan in 1991. But a zero dollars fee is, by definition, no fee at all since there is no charge or payment involved. Indeed, the Petitioner admits as much when it argues at page 17 of its brief that if the charge is zeroed out due to reciprocity agreements, there is no fee.

In *National Cable,* this Court was presented with the question whether the Communications Act applied to utility pole attachments that provide high-speed internet access at the same time as cable television. This Court noted that the Communications Act required the FCC to "'regulate the rates, terms, conditions for pole attachment,' § 224(b) and defines these to include 'any attachment by a cable television system,' § 224(a)(4)." 122 S Ct at 786. The respondents advanced the interpretation that it was wrong to concentrate on whose attachment was at issue, arguing instead that the focus should be on what the attachment does. *Id.* This Court, however, rejected this argument and applied the unambiguous language of the statute, reasoning that an enhanced service did not change the character of the attaching entity. *Id.* If the attachment was by a cable television system, that was what mattered under the statute.

The Petitioner and its *amici* make basically the same argument in this case. Even though the mention of reciprocal agreements is nowhere to be found in the statute, they nonetheless contend that Congress somehow meant that reciprocity agreements were to be used to limit the vehicle fee a state could charge once the SSRS was implemented. This conclusion, however, has no foundation in the plain language of 49 USC 14504(c)(2)(B)(iv)(III).

3. The Michigan Supreme Court's decision results in a statutory scheme that is coherent and consistent.

The Petitioner and its *amici's* reading of 49 USC 14504(c)(2)(B)(iv)(III) is inconsistent with a Congressional intent of balancing the interests of States and motor carriers. Just this term in *Barnhart v Sigmon Coal Co, supra,* this Court noted:

> As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v Shell Oil Co.,* 519 US 337, 340 (1997) (citing *United States v Ron Pair Enterprises, Inc.,* 489 US 235, 240 (1989)). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 US at 340. (534 US at ___; 122 S Ct at 950.)

In this case, the Michigan Supreme Court's reading of the plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) results in a statutory scheme that is coherent and consistent.

The Petitioner and its *amici* argue that the Michigan Supreme Court's decision is inconsistent with the statutory scheme, arguing that it could result in an increase in fees that would be contrary to Congressional intent. However, a review of the legislative history demonstrates that it is the Petitioner and its *amici's* reading that is inconsistent with the statutory scheme prescribed by Congress.

The argument advanced by the United States is representative of this claim. It argues that the Michigan Supreme Court's decision could result in a significant increase

in fees.[7] It further argues that "[n]othing in the legislative history suggests that Congress's effort to *preserve* state revenues (H R Conf Rep No. 404, *supra* at 437) (emphasis added) should be interpreted to allow the States to *increase* their registration fees." U.S. Brief, p 17 (emphasis in original). Reference to H R Conf Rep No. 102-404, 437 is instructive. It provides, in pertinent part:

> In order to preserve revenues for states which had participated in the bingo program, Section 405 establishes a new annual fee system enabling such states to continue to collect funds from interstate motor carriers.

As the foregoing demonstrates, Section 405 sought, as among its purposes, to "preserve revenues" to the extent that the States could "continue to collect funds from interstate motor carriers." The United States, however, interprets this legislative history as barring any and all increases in fees, even where the resulting fee would not exceed the $10 cap and when the State was actually charging or collecting such a $10 fee from carriers as of November 15, 1991.

With regard to fees, the intent of Congress was not to protect motor carriers from any or all increases in fees, but rather to preserve the flow of revenues to the States. After all, the SSRS had already, through its single state filing concept provided carriers with a considerable monetary benefit due to the significantly reduced administrative costs to be borne by the motor carriers. This reduction in administrative costs to motor carriers was due to the fact that henceforth the carrier

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[7] In this regard, it is unknown and speculative to predict what, if any, action other participating States would take should this Court affirm the Michigan Supreme Court. For its part, Michigan has no intention of rescinding the reciprocity arrangements it has as it indicated in its supplemental brief filed in January, 2002. Furthermore, the Respondents suspect that such uncertainty could finally prompt the Department of Transportation into replacing the SSRS, which it was required to do no later than December, 1997. See, ICC Termination Act of 1995, PL 104-88, § 13908, 109 Stat 888-889.

would only have to register for interstate authority in a single state. Previously, carriers would have to separately register in each State in which it operated. The problem with the single state filing concept, from the States' perspective, was that it would result in the loss of millions of dollars in revenue. The remedy chosen by Congress to ensure a continued revenue stream to the States was 49 USC 14504(c)(2)(B)(iv)(III). Congress accomplished this by providing that a State could charge a fee, not to exceed $10, that the State collected or charged as of November 15, 1991. Thus, if a State was collecting or charging the fee as of November 15, 1991, it could continue to do so under the SSRS. Congress neither specified what that fee could be (provided it was less than $10), nor did it indicate that the fee either had to be collected or charged from all carriers as of November 15, 1991. Furthermore, Congress did not specify that a State could only continue to collect and charge a fee from a carrier provided it collected from or charged a fee to that particular carrier on November 15, 1991.

Moreover, there is the matter of reciprocity agreements. As previously noted, Congress makes no mention of reciprocity agreements in 49 USC 14504. Presumably, the participating States under the SSRS continue to possess the authority to enter into or terminate reciprocity agreements just as they had been able to do prior to November 15, 1991. But under Petitioner's interpretation States lose flexibility to respond to changing circumstances because their ability to charge or not charge fees would be frozen in time. That is, there would be an economic disincentive for States to enter into any new reciprocity agreements, since those States would have no way to recapture the loss of revenues. The reasons for entering into or terminating reciprocity agreements will vary from State to State and change over time. Thus, the Petitioner's interpretation of 49 USC 14504 effectively eliminates the State's authority to enter into reciprocity agreements even though Congress has not ordained such a result. In short, the Petitioner has interpreted the SSRS in a manner that frustrates increased cooperation among the States.

B. THE ICC'S INTERPRETATION OF 49 USC 14504(c)(2)(B)(iv)(III) IS NOT BASED ON A PERMISSIBLE CONSTRUCTION OF THAT STATUTE.

In the event that this Court finds that 49 USC 14504(c)(2)(B)(iv)(III) is silent or ambiguous on whether the MPSC may lawfully charge or collect a $10 vehicle fee from the Petitioner, then it looks to whether the ICC's construction of that statutory provision is a permissible one. *Chevron, supra.* In this case, however, the ICC's construction is not an interpretation, but a rewrite.

The text of 49 USC 14504(c)(2)(B)(iv)(III) basically does three things. First, it authorizes the ICC to establish a fee system, with amended standards that results in a fee system that "will result in a fee for each participating State." Second, it places a cap on the fee such that it does "not exceed $10 per vehicle. Third, it states that the fee shall be "equal to the fee. . . that such state collected or charged as of November 15, 1991. The ICC's "interpretation" is not permissible, because it results in multiple fees per state, imposes a cap less than that authorized by Congress, and prevents Michigan from charging $10 per vehicle even though Michigan actually collected and charged the $10 per vehicle fee as of November 15, 1991.

1. 49 USC 14504(c)(2)(B)(iv)(III) mandated the ICC to establish a fee system that resulted in a single fee, not multiple fees, for each participating State.

49 USC 14504(c)(2)(B)(iv)(III) requires the ICC to establish a fee system that "will result in *a fee* for each participating state." (emphasis added). The word "fee" is singular, not plural. This by itself, however, is not conclusive inasmuch as the opening of the United States Code declares: "[i]n determining the meaning of any act or resolution of Congress, words importing the singular number may extend and be applied to several persons or things; [and] words

importing the plural number may include the singular; ..." 1 USC 1. Nevertheless, this principle does not require that singular and plural words forms have interchangeable effect.

In *First National Bank v Missouri,* 263 US 640 (1923), this Court declined to apply this principle to a statute that required that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate." 263 at 657. After noting that a strict reading of this statutory provision, employing as it does the article "an" to qualify words in the singular number would then confine the association to one office or banking house, this Court stated:

> We are asked, however, to construe it otherwise in view of the rule that "words importing the singular number may extend and be applied to several persons or things." Rev. Stat. § 1, Comp. Stat. § 1, 9 Fed. Stat. Anno. 2d ed. p. 388. But, obviously, this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. See *Garrigus v. Parke County,* 39 Ind. 66, 70; *Moynahan v. New York,* 205 N.Y. 181, 186, 98 N.E. 482. Here there is not only nothing in the context or in the subject-matter to require the construction contended for, but other provisions of the national banking laws are persuasively to the contrary. (263 US at 657.)

In this case neither the context nor subject matter requires the construction that multiple fees, based on the identity of a particular carrier, is required. To the contrary, the Congressional intent behind the enactment of the SSRS compels the opposite conclusion. That is, Congress sought to establish a single maximum per-vehicle fee per state rather than multiple maximum per-vehicle fees per State. This is because the SSRS, as an overall statutory scheme, sought to provide uniformity and simplification to the process of registering interstate vehicles in those States where they would

operate. The establishment of multiple maximum per vehicle fees per state is wholly inconsistent with such an overall statutory scheme.

Under the ICC interpretation, more than one fee is established for Michigan. There is the $10 fee for the majority of carriers and a fee of zero dollars for some other carriers. This, of course, is predicated on the assumption that there can be such a thing as a zero dollars "fee." See Argument A.2., *infra.* The statute, in the context of the overall statutory scheme to implement a simplified, uniform registration system, however, requires a single fee. The ICC's interpretation which results in the establishment of multiple fees for each participating State is in direct conflict with the fee system envisioned by Congress and is not a permissible interpretation.

2. The ICC's interpretation, (i) prevents Michigan from charging or collecting a $10 fee per vehicle even though Michigan charged and collected such a $10 fee as of November 15, 1991, and (ii) results in a cap on the per vehicle fee that is less than the $10 limit specifically set by Congress.

It is not disputed that Michigan collected or charged a $10 per vehicle fee as of November 15, 1991. Therefore, under the plain and unambiguous language of 49 USC 14504, Michigan should be permitted to continue to charge or collect up to $10 per vehicle under the SSRS. The ICC's interpretation, however, adds another condition not contained in the statute, i.e., that the $10 per vehicle fee must have been charged to or collected from a particular carrier as of November 15, 1991. But there is simply no requirement in 49 USC 14504 to that effect. Not only is Michigan's interpretation in line with the express language of the statute, it is consistent with its legislative history.

As previously noted, in H R Rep No. 102-171(I), p 115, which discussed an earlier version of the SSRS, a state could participate in the SSRS "if it had imposed and collected fees in 1991," reprinted in 1991 USCCAN at 1641. Clearly the focus

was on what actions the State undertook in 1991. Under the Conference substitute, the focus remained unchanged, as it is the action of the State in 1991 that determines whether the State can charge or collect the $10 fee. This is demonstrated by the fact that the language of 49 USC 14504(c)(2)(B)(iv)(III) refers only to the State and the fee collected or charged by the State. There is no mention of either reciprocity agreements or carriers.

As to the fee that could be charged or collected under the SSRS, Congress capped it at $10 per vehicle. Despite this, the ICC's interpretation effectively caps the fee at zero dollars for thousands of vehicles in States that charged and collected fees as of November 15, 1991. The concept that Congress intended to prohibit the States from collecting or charging a fee of up to $10 per vehicle, when their respective State statutes authorized them to do so and when those States charged or collected just such a per vehicle fee, as of November 15, 1991, has no foundation in the language of the statute.

The language of 49 USC 14504(c)(2)(B)(iv)(III) imposes a single fee cap of $10. It does not vest the ICC with the discretionary authority to either increase or decrease that limit for a particular carrier. Yet that is precisely what the ICC's interpretation does. The basis for this, according to the brief of the United States is constructed not from the language of the statute but rather from what Congress meant, but didn't say.

Under the ICC's interpretation, its setting of a per vehicle fee limit of less than $10 is constructed upon three intended, but not specified purposes, of Congress. First, that the fee a State may charge or collect under the SSRS is limited to what it charged to or collected from *a particular carrier*. Yet, the word "carrier" is absent from 49 USC 14504(c)(2)(B)(iv)(III). Second, that *reciprocity agreements* determine what fee the State charged or collected as of November 15, 1991. Yet, 49 USC 14504(c)(2)(B)(iv)(III) makes no mention of "reciprocity agreement." Third, that if a State did not charge or collect the $10 fee from a particular

carrier due to a reciprocity agreement, the State's per vehicle fee is forever capped at zero for that particular carrier since otherwise any charge by the State to that particular carrier would constitute an *increase* in fees. This, the ICC argues, is contrary to Congress's intent to preserve revenues for the State.

Recently in *Great West Life & Annuity v Knudson*, 534 US 204; 122 S Ct 708, 718 (2001), this Court noted:

> [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of the text regarding the *specific* issue under consideration. (quoting from *Mertens v Hewitt Associates*, 508 US 248, 261 (1993) (emphasis in original).

The foregoing principle, laid down in *Mertens*, has equal applicability here.

The ICC's setting of a fee cap of zero dollars per vehicle cannot be justified upon the vague notion that a basic purpose of Congress in establishing the SSRS was to preserve revenues for the States. The specific method chosen by Congress to preserve revenues was to allow a State to continue charging fees under the SSRS if it collected or charged a fee as of November 15, 1991. Moreover, Congress determined that the maximum fee a State could charge under the SSRS was $10 per vehicle, provided the State charged or collected such a fee from carriers as of November 15, 1991. Since Michigan in fact collected and charged the maximum $10 fee from carriers throughout 1991, it may continue to do so under the SSRS. The ICC's interpretation, however, prevents Michigan from charging or collecting a $10 fee per vehicle even though Michigan charged and collected such a $10 fee from carriers as of November 15, 1991. Furthermore, the ICC's interpretation results in a per vehicle fee cap that is less than the limit specifically set by Congress. Thus, the ICC's interpretation is not a permissible one since it is contrary to the language of 49 USC 14504(c)(2)(B)(iv)(III) and inconsistent with its legislative history.

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted

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Dated: May, 2002

Supreme Court U.S.
FILED
JUN 24 2002
OFFICE OF THE CLERK

(9)

No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,

Petitioner,

v.

MICHIGAN, ET AL.,

Respondents.

On Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we demonstrated that when Congress used the phrase "fee * * * collected or charged as of November 15, 1991" in the Intermodal Surface Transportation Efficiency Act ("ISTEA"), 49 U.S.C. § 11506(c)(2)(B)(iv)(III), it meant what it said: courts must look to the actual fee a State *did* collect or charge, not to the highest fee that the State *could have* collected or charged (what respondents refer to as the "generic fee"). Thus, reciprocity agreements must be taken into account in determining the fee that States may impose on motor carriers. At an absolute minimum, as we also argued, courts must defer to the Interstate Commerce Commission's ("ICC") reasonable conclusion that reciprocity agreements are relevant in determining a State's permissible fee under the ISTEA.

Respondents (collectively "Michigan") make no substantial response to these points. They do not even attempt to show how the statutory language — referring to fees that were "collected or charged" as of November 15, 1991 — can plausibly be read to reach fees that *were not, but theoretically could have been,* collected or charged as of that date. Nor do respondents make any meaningful attempt to explain how the many courts and agencies that agree with our reading of ISTEA could have so wildly misconstrued the statute's plain language. The decision below must accordingly be reversed.

A. The Plain Language Of The ISTEA Compels The View That Reciprocity Agreements Must Be Considered In Determining The Fee "Collected Or Charged As Of November 15, 1991"

Michigan devotes the bulk of its brief to the argument that the plain language of the ISTEA precludes the ICC's interpretation of the statute. See Resp. Br. 9-22. To succeed in that argument, Michigan would have to show that the language of the statute establishes unambiguously that the fees actually

charged under reciprocity agreements are wholly irrelevant to determining the "fee * * * collected or charged as of November 15, 1991" within the meaning of the ISTEA. Each of Michigan's attempts to make that showing ends in failure.

1. Michigan's first argument from the statutory text is that it is permitted to impose a $10 fee on *every* vehicle conducting operations in the State so long as it had imposed a $10 fee on *at least one* vehicle as of November 15, 1991. See Resp. Br. 12. That interpretation of the ISTEA, Michigan asserts, is the plain and unambiguous meaning of the statute. But the State's contention, which it did not advance below, is simply insupportable, for several reasons.

First, Michigan argues that its construction of ISTEA should be preferred because Yellow's reading of the statute ostensibly would produce a rule that is "carrier specific." Resp. Br. 12; see *id.* at 12-13, 15-16. Michigan thus asserts that, under our approach to ISTEA (and, of course, that of the ICC, the D.C. Circuit, and the Departments of Transportation and Justice), "a state may not henceforth collect or charge a $10 fee from a carrier unless it collected or charged that $10 fee from that particular carrier as of November 15, 1991." Resp. Br. 12. Michigan then proceeds to refute this supposed argument by pointing out that — under such a rule — a State would be precluded from imposing a fee on any carrier that came into existence or that expanded its operations into Michigan after November 15, 1991. *Id.* at 15-16.

Yellow, however, has never argued anything of the kind, and the ICC's construction of ISTEA does not produce any such result. Yellow has never suggested that the issue is whether Michigan charged a $10 registration fee *specifically to Yellow* as of the critical date. Rather, as Yellow argued in its opening brief, the issue is whether the fee was "collected from or charged to *carriers in Yellow's position*" as of November 1991. Pet. Br. 18 (emphasis added). Yellow's argument is, and always has been, that "the statute * * * forbids Michigan from

raising the fees that it collected or charged from each of the various categories of carriers *that it itself had established*." *Ibid.* (emphasis added). As a result, if a carrier comes into existence or expands operations into Michigan after November 15, 1991, the consequence under the ISTEA would turn on how Michigan treated similarly situated carriers as of November 15, 1991.

Moreover, as we also noted in our opening brief (at 18), the fee system established by Michigan law as of November 15, 1991, made provision for reciprocity agreements — meaning that the State's reciprocity policy was just as much an element of state law as was the statutory provision setting the so-called "generic" fees that would have been imposed in the absence of a reciprocal waiver. Surely, for example, had the Michigan statute expressly set out different fee levels for different categories of carriers as of November 15, 1991, the State could not now increase the fees charged to carriers in those various categories. But that is, in essence, precisely what Michigan seeks to do. Because Michigan had decided not to collect or charge any registration fee for Illinois base-plated vehicles as of November 15, 1991, the ISTEA prevents Michigan from collecting or charging a higher fee for those vehicles now.

Second, Michigan does not even acknowledge, let alone attempt to refute or distinguish, the avalanche of authorities that have rejected the proposition that the plain language of the ISTEA allows States to depart from reciprocity agreements. These authorities include: the ICC (see *Single State Insurance Registration,* 9 I.C.C.2d 610, 617-619 (1993) (Pet. App. 52a-54a)), the Department of Transportation (see *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Registration*, 9 I.C.C.2d 1184, 1192 (1993)), the Solicitor General (see U.S. amicus Br. 12-18), the D.C. Circuit (see *National Ass'n of Regulatory Util. Comm'rs* v. *ICC*, 41 F.3d 721,729 (D.C. Cir. 1994)), the Michigan Court of Claims (see JA 21), a majority of the Michigan Court of Appeals (see JA 29, JA 34-35), and two dissenting justices of

the Michigan Supreme Court (see JA 52, JA 58). Even the SSRS Procedures Manual — a document cited as authority by Michigan (Resp. Br. 5 n.3) and lodged by the State with the Clerk of the Court — rejects Michigan's reading of ISTEA. See SSRS Procedures Manual at 21 ("Reciprocity agreement(s) in effect as of November 15, 1991 *must be considered* when determining fees to be charged under this program.") (emphasis added).

2. Michigan also relies on what it perceives to be "the legislative history of the SSRS" (Resp. Br. 13) and the "Congressional intent" (*id.* at 20) underlying the statute. See, *e.g.*, *id.* at 13-15; 20-22. Needless to say, legislative history can have no relevance in determining the plain meaning of unambiguous statutory language. See, *e.g.*, *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993); *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). But Michigan's reading of the legislative history is, in any event, wrong on its own terms.

Michigan points to the fact that an early version of the ISTEA would altogether have prevented States from imposing registration fees while providing a one-year direct federal subsidy "to offset revenues lost" by States that "had imposed and collected fees in 1991." Resp. Br. 14 (citing H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. I, at 115 (1991), reprinted in 1991 U.S.C.C.A.N. 1641)). Michigan reasons from this history that Congress believed that the only relevant inquiry was whether a State had imposed some kind of fee in 1991, rather than one that looks to the level of fees imposed on various categories of carriers. That argument, however, is premised on a *non sequitur*. *No* version of the bill that became ISTEA would have allowed States to increase the level of fees they imposed on carriers. The statute that actually was enacted, of course, expressly froze those amounts. And Congress made clear that it intended to "*preserve* revenues for the states which had participated in the bingo program" (H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991), reprinted in 1991

U.S.C.C.A.N. 1817 (emphasis added)), rather than allow participating States to *increase* their revenues, as would be the case under Michigan's approach.

Similarly off base is Michigan's suggestion (Resp. Br. 20-22) that it should prevail because Congress was principally concerned with "preserv[ing] the flow of revenues to the States." In fact, after requiring that the ICC's standards for the SSRS contain a fee-freezing provision (see 49 U.S.C. § 11506(c)(2)(B)(iv)(III)), Congress emphasized that imposition of fees exceeding the November 15, 1991 levels "shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 11506(c)(2)(C). That, however, is precisely the result that would follow from Michigan's approach.

3. Michigan's final argument relating to ISTEA's plain language is its observation "that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements." Resp. Br. 17. As we explained in our opening brief (at 18-19), however, all state rules (such as reciprocity policies) that precluded imposition of a fee necessarily must be considered in determining whether a fee was in fact charged or collected. Moreover, as we also noted (at 22), if there is any doubt on that question, "such silence [in a statute] * * * normally creates ambiguity. It does not resolve it." *Barrhart* v. *Walton*, 122 S. Ct. 1265, 1270 (2002). See also Resp. Br. 9 (quoting (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)) ("'if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute'"). Michigan makes no response to these points.[1]

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[1] Michigan's reliance (at Resp. Br. 18) on *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000), for the proposition that Yellow's argument "adds a condition that is not contained in the language of the statute" is perplexing. The Court observed in *Artuz* that the statute there at issue "does not contain the peculiar suggestion that a single application can

Michigan further contends that Yellow's reading of the ISTEA somehow is suspect because it effectively results in the imposition of a "zero dollars fee" on beneficiaries of reciprocity agreements and "a zero dollars fee is, by definition, no fee at all." Resp. Br. 19. We are a little puzzled about where Michigan means to go with this argument, which was not raised below; however one characterizes the nature of the statutory restriction, the clear import of the ISTEA is that States may not collect more from carriers than was collected as of November 15, 1991. In any event, to the extent it is thought to make a difference, courts in fact do routinely refer to a fee of zero. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 117 (1992) (concurring opinion of O'Connor, J.) (examining reasonableness of attorney's fees and referring to a situation in which "a plaintiff * * * has obtained only a Pyrrhic victory for which the reasonable fee is zero"); *Jannotta* v. *Subway Sandwich Shops, Inc.*, 225 F.3d 815, 819 (7th Cir. 2000) ("'for trivial recoveries the only reasonable award of fees is zero'") (quoting *Fletcher* v. *City of Fort Wayne*, 162 F.3d 975, 976 (7th Cir. 1998)); *United States* ex rel. *Virani* v. *Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 579 (9th Cir. 1996) ("California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client * * *, the appropriate fee for the attorney is zero."). The plain language of the ISTEA therefore disposes of Michigan's argument.

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both be 'properly filed' and not 'properly filed.'" *Id.* at 10. But Michigan seeks to give just that sort of reading to ISTEA here, since its position is that its fee was both "charged" (because, in the absence of a reciprocity agreement, it was authorized by state law) and not "charged" (because it was in fact waived under a reciprocity agreement).

B. The ICC Reasonably Determined That Reciprocity Agreements Must Be Considered In Determining The Fee A State "Collected Or Charged As Of November 15, 1991"

In addition, as we showed in our opening brief (at 20-26), if there is any doubt about the meaning of ISTEA's language, the Court should defer to the ICC's reasonable construction of the statute. As we explained, (1) Congress expressly entrusted the ISTEA to the administration of the ICC, specifically directing the ICC to prescribe standards for the SSRS; and (2) the ICC arrived at its interpretation of the statute only after an extensive notice and comment period, during which the agency received and reviewed dozens of comments from all categories of interested parties. Under these circumstances, the ICC's interpretation of the ISTEA must be deemed correct unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Michigan does not take issue with any of these points. It contends, instead, that the ICC's approach must be rejected because the agency's "construction [of the ISTEA] is not an interpretation, but a rewrite." Resp. Br. 23; see *id.* at 23-27. This contention is insubstantial.

First, Michigan contends (Resp. Br. 23-25) that the ICC's interpretation of the ISTEA is contrary to the statute because the agency construes the term "fee * * * collected or charged as of November 15, 1991" to refer to multiple fee levels rather than only one fee level per State. But as Michigan concedes (*id.* at 23-24), Congress has expressly provided that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise — words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1.[2] The ICC thus was hardly arbitrary or capricious

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[2] In its brief (at 23), Michigan quotes the initial (1947) version of this statute, which provided that "[i]n determining the meaning of any Act or resolution of Congress words importing the singular number may extend and be applied to several persons or things." Pub. L. No.

in assuming that "fee" might mean varying fee levels when Congress has expressly provided for that result. That is especially so because there is no reason to believe that Congress intended to require the ICC to supersede varying fee levels that States had chosen to impose prior to November 15, 1991. After all, if Michigan is correct that all vehicles in a State must pay the same amount, the ICC could well have been required to provide that States with reciprocity waivers (such as Michigan) could not impose fees on *any* vehicles.

Second, Michigan asserts that the ICC's approach is inconsistent with the statute because it precludes the collection of fees from particular carriers even though Congress capped fees "at $10 per vehicle." Resp. Br. 26; see *id.* at 25-27. But this argument simply disregards the statutory language. The $10 figure is an upper limit; the rest of the provision provides that a State may not impose a fee that is larger than the one "such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III). And for reasons already explained, Michigan is wrong in reading ISTEA to allow it to collect $10 for *every* vehicle so long as it was collecting $10 for *any* vehicle as of November 15, 1991. As a consequence, the ICC's well-reasoned construction of the ISTEA must be regarded as authoritative.

C. Reversal, Not Remand, Is The Appropriate Disposition In This Case

Finally, although *amicus* United States plainly is correct in its analysis of the merits here, it is incorrect in suggesting that the case should be remanded for consideration of additional issues. See U.S. Br. 22-24. Neither of the additional questions raised by the United States requires further consideration on remand, and reversal therefore is the appropriate disposition.

80-278, § 1, 61 Stat. 633 (1947). We quote the current version, as it was amended by Pub. L No. 80-772, § 6, 62 Stat. 859 (1948) — although the differences obviously are immaterial.

The United States first suggests (U.S. Br. 22-23) that the case should be remanded to allow the Michigan Supreme Court to resolve an argument that Michigan raised below and in its Brief in Opposition *but no longer presses* — that the phrase "collected or charged as of November 15, 1991" was intended to refer to fees paid in 1991 for the 1992 registration year. See Pet. Br. 26-29. There is no need for a remand on that issue. We argued in our opening brief that this contention, which has been rejected by the ICC, is without merit. See *ibid.* Michigan does not respond to this argument in its brief on the merits or advance it as an alternative ground for affirmance. Moreover, when confronted with this issue, the court below declined to make it an alternative ground for its ruling. Reversal therefore is appropriate here.

The United States also posits that "[t]his case * * * may be complicated by the informality of Michigan's reciprocity policies." U.S. Br. 23. Citing extra-record material such as "[i]nformation gathered by the Department of Transportation" (*ibid.*), the United States suggests that there might be additional facts regarding those policies — not advanced by either party — that have some relevance here. Significantly, respondents did not adopt this argument in their merits brief. In these circumstances, there plainly is no need for a remand to address factual issues that neither the parties nor any of the courts below has ever identified as being of any concern.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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JUNE 2002

Supreme Court, U.S.
FILED
APR 5 2002
CLERK

No. 01-270

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v.

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ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 2146, permits States to charge commercial motor carriers operating in interstate commerce "a fee * * * that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv) (1994); 49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999). The question presented in this case is:

Whether the Michigan Supreme Court erred in holding that, under 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999), only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

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INTEREST OF THE UNITED STATES

This case presents a question about implementation of the federal statutory cap on registration fees that States charge interstate motor carriers who operate trucks and buses for hire. See 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). The United States has a substantial interest in the Court's resolution of that question. In 1991, Congress charged the Interstate Commerce Commission (ICC) with administering the Single State Registration System for commercial motor vehicles. See 49 U.S.C. 11506(c)(1) and (2) (1994). In 1995, Congress abolished the ICC and assigned the ICC's responsibility for administering the Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C.

14504 (Supp. V 1999) (recodified provisions governing Single State Registration System). In the decision under review in this case, the Michigan Supreme Court expressly rejected (Pet. App. 6a-9a) a decision of the ICC, upheld by the D.C. Circuit, that implemented the statutory fee requirements of the Single State Registration System.

The United States also has an interest because, as explained at pages 19-21, *infra*, the Court's resolution of this case may have a significant economic effect upon interstate motor carriers.

At this Court's invitation, the United States filed a brief as amicus curiae in this case at the petition stage.

STATEMENT

1. Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 2146, directed the ICC to amend its regulations to establish a Single State Registration System for commercial motor carriers subject to the ICC's jurisdiction. See 49 U.S.C. 11506(a) and (c)(1) (1994). Congress intended that the Single State Registration System would end the "bingo card" regime that had been in effect since the 1960s. That earlier system arose in connection with a federal authorization that allowed the States to require interstate motor carriers to submit proof of their ICC interstate operating authority. See 49 U.S.C. 11506(b) (1988). Under ICC regulations, each State could charge an annual registration fee of as much as ten dollars per vehicle in connection with the filing of the carrier's ICC certificate. See 49 C.F.R. 1023.13 (1990). As proof of state registration, the State would issue registration stamps for the carriers' vehicles, which the carriers' drivers would display on vehicle-specific cards purchased from the National Association of Regulatory Utility Commissioners (NARUC). See H.R. Rep. No. 171, 102 Cong., 1st Sess. Pt. I, at 49 (1991). As of 1991, 39 States (including respondent Michigan) collected registration fees under the bingo card program. The resulting state fees were estimated at $50 million to $60 million annually. *Ibid.*

Under Congress's Single State Registration System, by contrast, "a motor carrier is required to register annually with only one State" and "such single State registration shall be deemed to satisfy the registration requirements of all other States." 49 U.S.C. 14504(c)(1)(A) and (C) (Supp. V 1999); see 49 C.F.R. 367.4(b). Motor carriers generally register with the State where they have their principal place of business. If that State does not participate in the single-State program, the motor carrier registers in the State where it operates the largest number of vehicles.[1] 49 C.F.R. 367.3(a). The State in which the carrier registers collects per-vehicle fees from the carrier on behalf of the other participating States into which the carrier plans to send its trucks or buses. See 49 U.S.C. 14504(c)(2)(A)(iii) (Supp. V 1999); 49 C.F.R. 367.4(c)(4), 367.6(a). Carriers thus no longer have to obtain annual, vehicle-specific registrations from every State their vehicles enter.

ISTEA also limited the registration fees that each State could charge. Congress directed the ICC to

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[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the single-State program. 49 U.S.C. 14504(c)(2)(D) (Supp. V 1999). The eleven ineligible States are listed in H.R. Rep. No. 171, *supra*, Pt. I, at 49. Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-State program.

develop and adopt standards establishing a fee system that:

> (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.*

49 U.S.C. 11506(c)(2)(B)(iv) (1994) (emphasis added). When Congress reassigned responsibility for administering the Single State Registration System to the Secretary of Transportation, it gave the Secretary substantially the same authority.[2] Congress also provided in ISTEA that "[t]he charging or collection of any fee * * * that is not in accordance with the fee system established under subparagraph (B)(iv) * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 11506(c)(2)(C) (1994).

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[2] The Secretary's standards

> shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that—
>
> (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
>
> (II) minimizes the costs of complying with the registration system; and
>
> (III) *results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991*[.]

49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999) (emphasis added).

2. Under the bingo card system, it was common for States to enter into "reciprocity agreements" under which they reduced or eliminated registration fees for each other's motor carriers. During the ICC's rulemaking proceeding to implement the single-State system, the question arose whether States that participated in the new regime could increase their revenues by terminating reciprocity agreements that had been in effect in 1991. When proposing new rules in January 1993, the ICC initially questioned whether it had authority to require the States to preserve their reciprocity agreements. *Single State Ins. Registration*, No. MC-100 (Sub-No. 6), 1993 WL 17833, at *12 (ICC Jan. 22, 1993). The ICC noted that the agreements had been made voluntarily rather than by federal compulsion and that "it appears that as long as no carrier is charged more than the [State's] standard November 15, 1991, fee for all carriers (subject to the $10 limit), the requirements of the law are satisfied." *Ibid.*; see *Single State Ins. Registration–1993 Rules*, 9 I.C.C.2d 1, 11 (1992). The ICC added that "it might place a heavy administrative burden on a registration State" if the State had to "collect from different carriers different fees * * * depending on the various reciprocal agreements negotiated by the various States in which each carrier operates." 1993 WL 17833, at *12.

Commenters from the trucking industry, including petitioner, argued in response that the plain language of Section 11506(c)(2)(B)(iv)(III) requires that reciprocity agreements be considered when determining the fees "collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994); see Pet. App. 53a. Industry representatives further suggested that the terms of the States' reciprocity agreements could "easily be ascertained and disseminated," so that using

those agreements to calculate registration fees would not render the single-State system unduly burdensome to administer. Pet. App. 53a (discussing comments of American Trucking Associations). And the industry argued that—because most States eligible to participate in the single-State system charged per-vehicle fees of $1 or less under their reciprocity agreements—allowing States to raise fees to as much as ten dollars per vehicle could lead to a significant increase in overall fees. *Ibid.* One commenter estimated that state registration fees could increase from approximately $50 million annually before ISTEA to $200 million annually under the single-State system. *Ibid.* A major moving company suggested that its registration costs could increase by as much as $55 per truck if States were free to disregard their reciprocity agreements. *Ibid.*

In May 1993, the ICC promulgated rules to implement the single-State program. See Pet. App. 43a-101a (ICC rulemaking decision). The ICC concluded that its preliminary view on reciprocity agreements was inconsistent with the text of Section 11506(c)(2)(B)(iv) and with Congress's intent "that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced." *Id.* at 53a-54a. The ICC observed that if States discontinued their reciprocal fee reductions, "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls." *Id.* at 54a. Although reciprocity agreements might make fee calculations more cumbersome, the ICC determined that this administrative burden (which would fall mainly on the States) was "outweighed by the likely cost to carriers that could result" from terminating the reciprocity agreements. *Ibid.* Accordingly, the ICC determined that States participating in the Single State Registration System

"must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991, as required by §11506(c)(2)(B)(iv)." *Ibid.*[3]

NARUC and 18 state regulatory commissions sought review of the ICC's decision in the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. 2321(a) and 2342(5) (1994). See *NARUC* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994). The state regulators argued that, when Congress referred in Section 11506(c)(2)(B)(iv) to "the fee * * * that [a participating] State collected or charged as of November 15, 1991," it was referring to "the standard fee authorized by each participating State's law," rather than any lower amount that the State might actually have been collecting or charging. Br. of State Petitioners and Intervenors at 1-2 & n.1, 40, *NARUC* v. *ICC*, *supra* (No. 93-1362).

The D.C. Circuit rejected the state regulators' argument. *NARUC* v. *ICC*, 41 F.3d at 729. The court of appeals held that "the plain language of the statute precludes [the States'] interpretation" and "clearly freezes prior state charges" at the levels actually imposed as of November 15, 1991. *Ibid.* In addition, the court rejected the States' argument that the ICC's

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[3] The ICC's determination was consistent with the view of the Department of Transportation, which stated, in a related ICC proceeding, that "[i]f the fee charged on the statutory reference date was one set under a reciprocity agreement, it seems clear that such fee (assuming it is less than $10 per vehicle) constitutes the highest fee chargeable consistent with the provisions of ISTEA." Letter from Rosalind A. Knapp, Deputy General Counsel, Dep't of Transp., to Sidney L. Strickland, Jr., Secretary, ICC, *American Trucking Ass'ns—Pet. for Declaratory Order—Single State Ins. Registration*, ICC No. 41,086, at 2 (Oct. 1, 1993).

interpretation was irrational because it would grandfather any registration fees that were charged in violation of state law as of November 15, 1991. *Ibid.* Section 11506(c)(2)(b)(iv), the court of appeals reasoned, "merely states that the state may not charge *more* than was charged or collected in the past." *Ibid.* That Section, the court explained, does not provide that any fee charged by a State as of November 15, 1991, is lawful. *Ibid.* Because carriers would not be obligated to pay fees that were illegal under state law when imposed, the court determined that the ICC's reading of ISTEA's fee cap did not produce the anomalous results suggested by the state regulators. *Ibid.* No party sought review of the D.C. Circuit's decision in this Court.

3. a. Petitioner in this case is a major interstate trucking company headquartered in Kansas. Pet. 1; Pet. App. 40a. Some of petitioner's trucks carry Illinois license plates. See Pet. 3. For calendar years 1990 and 1991, Michigan did not charge petitioner any bingo stamp fee for trucks that were "base-plated" in Illinois and entered Michigan, Pet. App. 39a-40a; Br. in Opp. App. 3b, because it believed that Illinois did not charge Michigan-based motor carriers a fee. Br. in Opp. App. 3b. Michigan and Illinois did not have a formal reciprocity agreement, however. See *ibid.*

In 1991, Michigan adopted a new policy under which it bases its reciprocal fee reductions on the policies of the State where the carrier has its principal place of business, rather than the State in which a particular vehicle is base-plated. Pet. App. 40a-41a; Br. in Opp. App. 4b-5b. Because petitioner's home State of Kansas did not waive fees for Michigan trucks, Michigan levied its maximum statutory fee of ten dollars per truck on all of petitioner's trucks, including trucks base-plated in

Illinois.[4] In September 1991, Michigan mailed petitioner a fee assessment for calendar year 1992 that had been calculated using the new methodology. Pet. App. 25a, 40a-41a; Br. in Opp. App. 4b-5b. In later years, Michigan continued to assess a ten-dollar fee on each of petitioner's trucks. Pet. App. 40a-41a.

Petitioner paid Michigan's registration fees through its registration State of Kansas and brought suit in the Michigan Court of Claims. Petitioner sought a refund of the fees it paid to Michigan for its Illinois-plated trucks for 1994 (when the Single State Registration System became effective, see 49 U.S.C. 11506(c)(3) (1994)) and later years. See Pet. 11. The Michigan trial court ruled in favor of petitioner. Pet. App. 39a-42a. The court relied on a declaratory order of the ICC in which the ICC, after notice and comment, held that ISTEA's cap on fees at the level "collected or charged as of November 15, 1991," 49 U.S.C. 11506(c)(2)(B)(iv) (1994), referred to fees for calendar year 1991, not fees assessed in advance for calendar year 1992. Pet. App. 41a-42a; see *American Trucking Ass'ns—Petition for Declaratory Order—Single State Ins. Registration*, 9 I.C.C.2d 1184, 1192, 1195 (1993). Deeming the ICC's decision "dispositive," Pet. App. 41a, the trial court held that Michigan's assessments on petitioner's Illinois-licensed trucks were unlawful under ISTEA because

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[4] Michigan law provides:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The [Michigan Public Service Commission] may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

Mich. Comp. Laws Ann. § 478.7(4) (West 1991).

they exceeded the fees Michigan had charged petitioner for its Illinois-licensed trucks for calendar year 1991, *id.* at 42a.

b. The Michigan Court of Appeals affirmed. Pet. App. 23a-35a. In the intermediate court's view, Section 11506(c)(2)(B)(iv) did not unambiguously answer the question of whether a fee billed before November 15, 1991 for calendar year 1992 may be considered when determining the State's maximum fee under the Single State Registration System. *Id.* at 28a. Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and state court decisions, the Michigan Court of Appeals held in relevant part that the ICC's rule against considering fees charged in advance for calendar year 1992 was reasonable and entitled to deference. Pet. App. 27a-29a. Relying on the D.C. Circuit's decision in *NARUC* v. *ICC, supra*, the court also rejected Michigan's argument that fee reductions that resulted from reciprocity agreements need not be considered when applying ISTEA's fee cap. Pet. App. 29a.

c. The Michigan Supreme Court reversed. Unlike the lower state courts, it did not consider the significance of Michigan's change from a base-plate reciprocity methodology to a place-of-business methodology for calendar year 1992. Instead, the Michigan Supreme Court addressed the more "fundamental" question of whether reciprocity agreements should be considered at all when determining what fees Michigan collected or charged as of November 15, 1991. Pet. App. 6a. The Court concluded that reciprocity agreements are not relevant because 49 U.S.C. 11506(c)(2)(B) (iv) (1994) unambiguously requires one to "look not at the fees paid by plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991." Pet. App. 9a. The court expressly rejected the D.C. Circuit's contrary conclusion in *NARUC* v. *ICC, supra*. Pet. App. 6a-7a. Because it considered ISTEA to be clear on its face, moreover, the court refused to afford *Chevron* deference to the ICC's determination that reciprocity agreements must be considered when setting fees. *Id.* at 8a-9a. Accordingly, the Michigan Supreme Court held that the fee Michigan "charged or collected as of November 15, 1991" was the ten-dollar maximum fee authorized by Michigan law on that date, without regard to whether Michigan actually waived fees under its reciprocity policy. *Id.* at 10a.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the Michigan Supreme Court, the language of ISTEA does not establish that a State's generic registration fee is the only relevant historical fee for purposes of applying 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). Plainly, Congress's reference to "the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991" does not foreclose consideration of registration fees that were collected or charged on a reciprocal basis. The legislative history of ISTEA, moreover, shows that Congress intended to *preserve* pre-existing state revenues from truck and bus registrations while reducing the burden that state registration programs placed on motor carriers. There is no indication that Congress intended to allow the States to raise their registration fees at the expense of motor carriers; indeed, Congress gave every indiction that it intended to minimize the costs of state registration.

2. This case could appropriately be resolved on the basis that, as the D.C. Circuit held in *NARUC* v. *ICC*,

41 F.3d 721, 729 (1994), ISTEA mandates consideration of reciprocal fees collected or charged as of November 15, 1991. If the Court concludes that the statute is ambiguous on that point, however, then it should defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the ICC's reasonable rejection of the generic-fee approach that the Michigan Supreme Court adopted. As the ICC explained in its 1993 rulemaking decision, the generic-fee approach would allow States to increase their registration fees substantially and might thereby undermine the intended benefits of the Single State Registration System. The ICC reasonably refused to invite that consequence.

3. The case should be remanded to the Michigan Supreme Court so that it may consider additional issues that are outside the scope of the question on which this Court granted certiorari. Those issues include the cognizability of Michigan's fee assessments for calendar year 1992, which were made before November 15, 1991.

ARGUMENT

THE MAXIMUM STATE REGISTRATION FEE UNDER THE SINGLE STATE REGISTRATION SYSTEM MAY BE LESS THAN THE STATE'S GENERIC FEE

In 1991, Congress directed the ICC to adopt standards to implement the Single State Registration System. See 49 U.S.C. 11506(c) (1994). Congress specified that the ICC's implementing standards should reflect the new statutory cap on state registration fees. 49 U.S.C. 11506(c)(2)(B) (1994). And Congress provided that "[t]he charging or collection of any [registration] fee * * * that is not in accordance with the fee system established [by the ICC] shall be deemed to be a burden

on interstate commerce." 49 U.S.C. 11506(c)(2)(C) (1994). The ICC issued its implementing standards in May 1993, and they became effective on January 1, 1994. Pet. App. 43a, 81a; see 49 U.S.C. 11506(c)(3) (1994).

In 1995, Congress abolished the ICC and assigned the Secretary of Transportation the ICC's former responsibility for administering the Single State Registration System. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C. 14504 (Supp. V 1999) (recodification of former Section 11506, as amended). Section 204(a) of the ICC Termination Act, 109 Stat. 941, provided that "[a]ll orders, determinations, rules, [and] regulations" of the ICC "that are in effect on the effective date of such transfer * * * shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked." 49 U.S.C. 701 note (Supp. V 1999) (Savings Provision). In October 1996, the Federal Highway Administration (an operating administration under the Secretary of Transportation) formally adopted the ICC regulations that implemented the Single State Registration System and redesignated them as Part 367 of Title 49 of the Code of Federal Regulations. 61 Fed. Reg. 54,706, 54,707 (1996). Those regulations remain in effect.[5]

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[5] Authority to administer these regulations is now held by the Federal Motor Carrier Safety Administration, a recently created operating administration within the Department of Transportation. See 49 U.S.C. § 113 (Supp. V 1999). Congress has authorized the Secretary of Transportation to adopt new regulations that could modify or terminate the Single State Registration System. 49 U.S.C. 13908 (Supp. V 1999). To date, however, the Secretary has not exercised that authority.

Congress thus made an express delegation of authority to the ICC and, later, the Secretary of Transportation to elucidate ISTEA's fee cap; the responsible agencies have interpreted the fee cap through the ICC's notice-and-comment rulemaking; and the ICC's interpretation was subject to judicial review and upheld, see *NARUC* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994). In these circumstances, the ICC's implementation of the fee cap—which the Michigan Supreme Court rejected in this case—is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171-2173 (2001). Specifically, the ICC's rejection of a generic-fee rule must be deemed controlling unless (1) ISTEA "unambiguously forbids the [ICC's] interpretation" or (2) the ICC's interpretation of ISTEA is not within the range of permissible readings. *Barnhart* v. *Walton*, No. 00-1937, 2002 WL 459209, at *4 (Mar. 27, 2002); see *Chevron*, 467 U.S. at 842-845. Since neither condition is satisfied in this case, the ICC's (and now the Secretary of Transportation's) interpretation should be enforced.

A. ISTEA DOES NOT COMPEL THE MICHIGAN SUPREME COURT'S GENERIC-FEE RULE

1. The Michigan Supreme Court correctly recognized (Pet. App. 8a) that it could not override the plain terms of ISTEA. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks omitted). Yet, the state court manifestly erred in holding (Pet. App. 9a) that "the plain meaning of" 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999) "clear[ly]" establishes that only a State's "generic" registration fee as of November 15, 1991, is relevant when applying ISTEA's fee cap.

ISTEA requires that the Single State Registration System must "result[] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999); see 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994). In *NARUC* v. *ICC*, *supra*, the United States Court of Appeals for the District of Columbia Circuit correctly concluded that this language, on its face, "precludes" an approach that would look to only the maximum fee (of ten dollars or less) authorized by the relevant State's law as of November 15, 1991. 41 F.3d at 729. Whether or not this Court agrees with the D.C. Circuit's reading, however, the language of ISTEA forecloses the Michigan Supreme Court's exactly contrary holding that the generic fee is the only relevant historical charge. Registration fees indisputably can be "collected or charged" even if they were set on a reciprocal basis, rather than by operation of a State's generic-fee statute.

It might be argued that "the fee * * * collected or charged as of November 15, 1991," should be read as if Congress had said "the *highest* fee * * * collected or charged as of November 15, 1991," or, alternatively, "the fee * * * collected or charged to *any carrier* as of November 15, 1991." But Congress did not include such words. In their absence, the fact that a State lawfully could have charged a carrier more than the reciprocal fee that it actually charged as of November 15, 1991, does not support the Michigan Supreme Court's holding.

Nor can former Section 11506 and current Section 14504 be read as outlawing reciprocity arrangements and requiring every State to charge all carriers the same registration fee. Congress did not dictate a uniform fee; it instead provided that a State's fee could not "exceed $10 per vehicle." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994); 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). There also is no statutory reporting requirement or other provision that would have the practical effect of requiring each State to have a single, uniform registration fee. Furthermore, the aggregated registration payment that each carrier makes to its registration State is necessarily carrier-specific, because it must "be based on the number of commercial motor vehicles the carrier operates in a [participating] State and on the number of States in which the carrier operates." 49 U.S.C. 11506(c)(2)(B)(iv)(I) (1994); see 49 U.S.C. 14504(c)(2)(B)(iv)(I) (Supp. V 1999).

2. The legislative history of ISTEA's fee-cap provision confirms that Congress did not establish each State's generic registration fee as the benchmark. Congress enacted the Single State Registration System because legislators perceived that the bingo card system was a "costly mechanism which d[id] not serve a purpose that justifies its cost." H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. I, at 49 (1991). The motor carrier industry estimated that its costs of complying with the bingo card system were $250 million per year, whereas the program generated only $50 to $60 million in annual registration fees for the States. *Ibid.* Congress therefore abolished the bingo card program and established the Single State Registration System "to benefit the interstate carriers by eliminating unnecessary compliance burdens" and, in addition, to benefit consumers.

H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991).

The House version of what became ISTEA would have ended completely state registration of carriers' federal operating authority and provided $50 million in federal grants to compensate the States for their resulting loss of registration fees. H.R. Rep. No. 171, *supra*, Pt. I, at 49-50, 115. The Senate bill would not have changed the bingo card program or affected States' registration fees. See H.R. Conf. Rep. No. 404, *supra*, at 437. The ensuing conference agreement reflected the House's objective of lowering industry compliance costs by terminating the bingo card program, but also addressed—through the "new annual fee system" codified at 49 U.S.C. 11506 (1994)—the conferees' concern for "preserv[ing] revenues for the states which had participated in the bingo program." H.R. Conf. Rep. No. 404, *supra*, at 437.

The ICC correctly determined in its 1993 rulemaking that Congress's intent when abolishing the bingo card system and capping state registration fees was "that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced." Pet. App. 53a-54a. Nothing in the legislative history suggests that Congress's effort to "*preserve*" state revenues (H.R. Conf. Rep. No. 404, *supra*, at 437 (emphasis added)) should be interpreted to allow the States to *increase* their registration fees. Yet that would be the likely result of allowing States to terminate the reciprocity arrangements that were in place as of 1991 and charge any higher fee (of up to ten dollars) that was authorized by state law—and thereby

threaten to increase, rather than reduce, the burden of the registration system on carriers.[6]

B. IF THE STATUTE IS AMBIGUOUS, THEN THE ICC'S REASONABLE INTERPRETATION SHOULD BE DEEMED CONTROLLING

If Section 14504(c)(2)(B)(iv)(III) is ambiguous and does not clearly compel the ICC's rejection of the generic-fee approach, then this Court should enforce the ICC's decision if it embodies "a reasonable policy choice." *Chevron*, 467 U.S. at 845; see, *e.g.*, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 21 (2000); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-426 (1999); *National R.R. Passenger Corp.* v. *Boston and Me. Corp.*, 503 U.S. 407, 417-424 (1992). See also *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (principles of deference "have particular force" where subject of regulation is technical, agency has expertise, and agency interpretation closely followed statute in time).[7]

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[6] There is a textual argument that 49 U.S.C. 14504(c)(2)(B)(iv) and (C) (Supp. V 1999) *freeze* state registration fees, rather than capping them. The legislative history discussed above, however, suggests that Congress would not have intended to prohibit the States from voluntarily reducing their registration fees below 1991 levels. In any event, the issue of whether a State may charge *less* than the maximum fee determined under Section 14504(c)(2)(B)(iv) has not been raised in this case and it is unlikely ever to generate a justiciable controversy between a State and a motor carrier.

[7] Principles of repose also support deference in this case, because the same question on which this Court granted certiorari was decided against state regulatory commissions in *NARUC* v. *ICC*, *supra*, on direct judicial review of the ICC's rulemaking decision. The petition in this case suggests (at 27 n.13) that "as a party in the [ICC's rulemaking] proceeding, [respondent] Michigan Public Service Commission arguably is bound by its results." See

Successful implementation of the Single State Registration program since 1994 has borne out the ICC's predictive judgment (Pet. App. 54a) that a workable fee system does not depend upon adoption of the generic-fee approach. As the ICC also explained in its 1993 rulemaking decision (*ibid.*), "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls," if States that participate in the Single State Registration System could charge all carriers the maximum fee (of up to ten dollars) that the State lawfully charged (or could have charged) any carrier in 1991. As noted above, see p. 6, *supra*, comments submitted to the ICC during its rulemaking proceeding suggested that, in the early 1990s, state fees could have quadrupled—from approximately $50 million to approximately $200 million nationwide—under the generic-fee approach. *Id.* at 53a. The potential dollar increase would be much greater today, since the number of commercial motor vehicles registered in the United States has approximately doubled since 1991 and state registration revenues have grown accordingly.[8]

Yakus v. *United States*, 321 U.S. 414, 427-448 (1944); but see *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (holding that substantive validity of agency rule may be raised as defense in enforcement action). Because that preclusion issue was not presented to or passed on by the Michigan Supreme Court, it need not be addressed by this Court. But principles of repose—embodied in the 60-day deadline for filing a direct challenge to the ICC's 1993 rulemaking (28 U.S.C. 2344 (1994)) and in the requirement that direct review be conducted on the agency's record (28 U.S.C. 2347(a) (1994))—nevertheless should add to the disinclination to overturn the ICC's regulatory policy almost a decade after its adoption.

[8] See *Testimony and Supplemental Material for Hearing on S. 1501, the Motor Carrier Safety Improvement Act of 1999*

In connection with the preparation of this Brief, the Department of Transportation informally surveyed the States about the effect that the Michigan Supreme Court's generic-fee rule might have if applied to their registration programs. The Department determined that at least 23 of the 38 States that participate in the Single State Registration System have reciprocity arrangements with other States.[9] Five States that reduce their fees on a reciprocal basis provided the Department specific information about their fee revenues.[10] Those five States reported collective registration revenues of $8.5 million in 2001 and indicated that their registration fees would climb to a collective total of $20 million if each State's generic fee were charged and the number of registered vehicles did not decrease. The magnitude of the fee increase for each State varied greatly. In two of the States, fees would increase by approximately 50% if the generic fee were charged. In another two States, fees would more than double. In one State, fees would increase by more than 300%. Although the Department's sample encompasses

(Sept. 29, 1999) (visited Apr. 4, 2002) <http://www.senate.gov/commerce/hearings/0929sha.pdf> (Senate committee testimony of Kevin Sharpe, National Conference of State Transportation Specialists, stating that state registration fee collections totaled approximately $95 million as of 1999).

[9] The Department identified seven participating States that do not have reciprocal arrangements, and it was unable to determine whether the remaining eight participating States have reciprocal arrangements.

[10] The five States are Indiana, Minnesota, Oklahoma, South Dakota, and Texas. Alabama reported that, although it charges registration fees on a reciprocal basis, reciprocity does not affect its fees because Alabama's generic fee of $0.45 per vehicle per year is lower than the fees charged by the States with which Alabama has reciprocity arrangements.

just a handful of the States that have reciprocity arrangements, it confirms the ICC's judgment (Pet. App. 54a) that there could be a substantial fee increase if reciprocity arrangements were abandoned, and that some States could collect windfall revenues at the expense of the motor carrier industry.

The sample also highlights the arbitrary results that a generic-fee rule could produce. Even if two States charged exactly the same fees as of November 15, 1991, they would be treated differently under the generic-fee approach if their state statutes set different generic fees. There is no sound policy reason why State A should be able to enforce, under the single-State program, a generic fee that it did not levy under the bingo card regime, while State B, which charged exactly the same fees under the bingo card program, would be precluded from raising its fees if its legislature had not seen fit to set a high generic fee under the bingo card system.

Michigan has argued (Supp. Br. in Opp. 1) that it has no intention of terminating its current reciprocal arrangements and increasing its registration fee to ten dollars per vehicle for all carriers. Michigan also states (*id.* at 1-3) that such a fee increase would violate Section XIII.A. of the National Conference of State Transportation Specialists' *Procedures Manual for the Single State Standards for Registration of Interstate Motor Carrier Operations Under Section 4005, Title IV* (rev. July 1, 1994) (*Procedures Manual*), which sets out rules that the States participating in the Single State Registration System have adopted and agreed among themselves to follow. But neither of those arguments suggests that, under the Michigan Supreme Court's approach, federal law would prevent a State from terminating its reciprocal fee reductions and adopting a

generic fee of as much as ten dollars. As the ICC determined (Pet. App. 53a), construing federal law as permitting such fee increases would be "inconsistent with the spirit of ISTEA." The ICC's rejection of the generic-fee rule adopted by the Michigan Supreme Court in this case was reasonable.

C. THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF ISSUES THAT ARE NOT BEFORE THIS COURT

When granting the petition in this case, the Court—consistent with the suggestion of the United States in its brief as amicus curiae at the petition stage (at 14-16)—reformulated the question presented to reflect the Michigan Supreme Court's precise holding that only Michigan's ten-dollar generic fee is relevant to applying ISTEA's fee cap. See 122 S. Ct. 918 (2002). The judgment of the Michigan Supreme Court therefore should be reversed and the case should be remanded for consideration of additional issues on which that court did not rule. Cf. *Mead*, 121 S. Ct. at 2177; *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 394-395 (1999).

In particular, the Michigan Supreme Court has not addressed the question of whether ISTEA allows Michigan to set its registration fees at the level that it charged under its new reciprocity policy in September 1991, for calendar year 1992. See Pet. App. 28a (Michigan Court of Appeals holding that registration "fees should be fixed at the level in effect for the 1991 registration year, regardless of whether a new basis for determining reciprocity had been announced for 1992 or whether certain carriers had paid fees for 1992 before November 15, 1991"). That question implicates not only the ICC's decisions (see Pet. App. 26a-29a), but also

issues about Michigan's ability to modify the base-plate reciprocity policy it followed until 1991 and to adopt a place-of-business reciprocity rule that better fits the Single State Registration System.[11] Those issues should be addressed by the Michigan Supreme Court on remand.[12]

This case also may be complicated by the informality of Michigan's reciprocity policies. The record suggests that Michigan unilaterally canceled its reciprocity agreements with other States in 1989. Br. in Opp. App. 3b. Information gathered by the Department of Transportation indicates that, thereafter, Michigan's fee waivers were not based on formal agreements or even a reciprocal waiver by the other State in all instances. The legal significance of those facts—if any—has not

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[11] See Br. in Opp. 9, 11; Br. in Opp. App. 4b, 5b. See also *Procedures Manual* § XIII.B. (encouraging use of carrier's principal place of business as basis for reciprocity, by providing that "[a] motor carrier whose principal place of business is located in a state not eligible to participate in this program *shall not* use its designation of a registration state for this program to afford itself any benefits of reciprocity agreements of that registration state").

[12] In October 1998, the State of Michigan and the Michigan Public Service Commission petitioned the Administrator of the Federal Highway Administration to revisit the ICC's holding in *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993), that Section 11506's fee cap forbids consideration of fees assessed in advance for calendar year 1992. See *id.* at 1192, 1195. In 2000, motor-carrier safety matters—including Michigan's petition—were transferred from the Federal Highway Administration to the Federal Motor Carrier Safety Administration. The Michigan Supreme Court's holding in this case mooted the relief Michigan sought in its petition. Reversal of the Michigan Supreme Court's decision, however, would provide the agency an opportunity to address Michigan's petition.

been considered by the Michigan courts and might be a proper subject for consideration on remand.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed, and the case should be remanded to provide that court an opportunity to consider additional issues on which it did not rule.

Respectfully submitted.

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APRIL 2002

(5)

Supreme Court, U.S.
FILED
JAN 23 2002
CLERK

No. 01-270

In the Supreme Court of the United States

October Term, 2001

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

v

STATE OF MICHIGAN, *ET AL*,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

SUPPLEMENTAL BRIEF FOR THE STATE OF MICHIGAN, *ET AL* IN OPPOSITION

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In accordance with Rule 15.8, the Respondents State of Michigan, *et al* submit this Supplemental Brief in response to the Brief of the United States as Amicus Curiae that was filed on January 2, 2002 and subsequent to Michigan's Brief in Opposition.

1. Michigan will not and cannot prospectively increase its fees.

In its brief, the United States argues that the petition for certiorari should be granted but limited to the question of whether the Michigan Supreme Court erred in its statutory construction of 49 USC 11506(c)(2)(B)(iv)(III) [recodified as 49 USC 14504(c)(2)(B)(iv)(III)]. The State of Michigan disagrees and continues to believe that the Michigan Supreme Court did not err and that the correct result was reached. The United States argues that this issue is of considerable importance because the "Michigan Supreme Court's decision would seem prospectively to allow Michigan to charge *all* interstate carriers a fee of ten dollars per vehicle for *all* trucks that enter Michigan" United States brief, p. 11 (emphasis in original). The United States then concludes that if "Michigan eliminated all those fee waivers, then the decision below would result in significant fee increases for the trucking industry even if no other State followed Michigan's lead." United States brief, p. 12. However, Michigan will not and cannot prospectively increase its fees.

Michigan states unequivocally that it has no intention whatsoever to eliminate the fee waivers currently in place. Simply put, Michigan will continue to honor all fees waivers currently in place. Thus, contrary to the concern voiced in the United States' brief there will be no increase in fees in Michigan.

Moreover, Michigan submits that neither it, nor any state participating in the Single State Registration System (SSRS) can henceforth begin charging and collecting a $10.00 fee from all interstate vehicles. This is because Michigan and

all other states participating in the SSRS Program are required to follow the SSRS Procedures Manual, *Procedures Manual for the Single State Standards for Registration of Interstate Motor Carrier Operations Under Section 4005, Title IV* (July 1, 1994).[1] At p. 21 of that manual, it states:

> XIII. RECIPROCITY
>
> A. Reciprocity agreement(s) in effect as of November 15, 1991 must be considered when determining fees to be charged under this program.

If Michigan were to cancel all reciprocity agreements and then attempt to collect a $10.00 fee from all interstate motor carrier vehicles, it would violate XIII. A. of the SSRS Procedures Manual. Participation in the SSRS Program is conditioned on compliance with the standards set forth in the SSRS Procedures Manual. *See,* SSRS Procedures Manual, III. B., p. 3. Failure to comply would lead to Michigan's expulsion from the SSRS Program and forfeiture of the ability to collect any such fees.

The United States, in a footnote on page 12 of its brief notes these SSRS Procedures Manual requirements, but concludes that such requirements do not have the force of law and apparently does not view it as precluding Michigan from increasing its fees.

To the contrary, Michigan believes it is bound by the requirements of the SSRS Procedures Manual. Moreover, the Michigan Court of Appeals, in a recent decision approved of the Michigan Public Service Commission's use of the SSRS Procedures Manual. In *Schneider National Carriers v State of Michigan,* ___ Mich App ___; ___ NW2d ___; 2001 Mich LEXIS 205 (2001) (application for leave to appeal to Michigan Supreme Court applied for), the MPSC followed the SSRS

[1] Copies of the SSRS Procedures Manual have been lodged with the Clerk.

Procedures Manual in requiring the filing of proof of insurance and in assessing a $10 fee for the filing. The plaintiffs asserted that the MPSC lacked express statutory authority to collect the fee. As noted by the Court, "The crux of the dispute is whether the MPSC had the authority to modify its procedures to comply with the SSRS without statutory authorization from the Legislature." The Court of Appeals held that it did, thus recognizing the legally binding effect of the SSRS Procedures Manual. Therefore, despite the Michigan Supreme Court's decision below, Michigan, or for that matter any state participating in the SSRS Program, cannot increase the amount of the fees now being charged to interstate vehicles. To do otherwise would no doubt subject such a State to lawsuits by other States as well as lawsuits by other motor carriers.

2. This case is effectively moot since Congress in the ICC Revocation Act of 1995 has commanded the Secretary of Transportation to replace the SSRS Program.

Michigan further submits that certiorari is not warranted because a change in the law effectively renders this matter moot. In a footnote on page 14 of the United States' brief it is noted that Congress has "authorized the Secretary of Transportation to adopt new regulations that could modify or terminate the Single State Registration System. 49 USC 13908 (Supp V 1999)." Congress, however, did more than merely "authorize" the Secretary to "modify" the SSRS. Reference to that statutory provision, which was contained in the ICC Termination Act of 1995, presents a far more critical impact than the United States' brief suggests. In short, Congress commanded that the Secretary replace the SSRS by a date certain.

Section 13908(a) of the ICC Termination Act of 1995, PL 104-88, at 109 Stat 888-889, states that:

> (a) REGULATIONS REPLACING CERTAIN PROGRAMS- *The Secretary*, in

> cooperation with the States, and after notice and opportunity for public comment *shall* issue regulations to *replace* the current Department of Transportation identification number system, *the single State registration system under section* 14504, the registration system contained in this chapter, and the financial responsibility information system under section 13906 with a single, on-line, Federal system. (Emphasis added).

Section 13908(e) of the ICC Termination Act of 1995 requires the Secretary to conclude rulemaking within 24 months after the effective date of Section 13908. The ICC Termination Act of 1995 became effective December 29, 1995, thus regulations should have been promulgated by December, 1997, over 4 years ago. Additionally, Section 13908(d)(1) provides that each State will receive at least as much revenue as that State received in fiscal year 1995. Thus, any grant of review by this Court could jeopardize the revenue stream guaranteed to Michigan under the ICC Termination Act of 1995. While the U.S. Department of Transportation has not promulgated such regulations, the foregoing mandate remains in effect. In any event, since Congress has commanded that the current SSRS is to be replaced, review of this case by this Court is not warranted.

CONCLUSION

For the reasons set forth herein and for those reasons set forth in its Brief in Opposition, the State of Michigan, *et al,* respectfully request that this Honorable Court deny the Petition for *Certiorari.*

Respectfully submitted

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Dated: January 2002

Supreme Court, U.S.
FILED
APR 5 2002
OFFICE OF THE CLERK

No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,
Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY AND ITS STATE TREASURER, MICHIGAN DEPARTMENT OF COMMERCE AND ITS DIRECTOR, AND MICHIGAN PUBLIC SERVICE COMMISSION AND ITS COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, AND JOHN L. O'DONNELL,
Respondents.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., SCHNEIDER NATIONAL, INC., AND ABF FREIGHT SYSTEM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679 ..... *passim*

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,300 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA has a strong interest in the question presented in this case, and it actively participated in the administrative rulemaking process before the Interstate Commerce Commission ("ICC"). See Pet. App. 46a (ICC's statement that ATA "submitted extensive comments voicing motor carrier concerns"). ATA also brought the petition for declaratory order before the ICC that resulted in the decision in *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993) (*ATA*). That declaratory order decision rejected the main argument on which the State relied in its brief in opposition to the certiorari petition in this case, see Br. in Opp. 16-26, and the state trial and intermediate appellate courts deferred to the ICC's decision in the proceeding brought by ATA, as well as the ICC's earlier rulemaking. See Pet. App. 26a-29a, 41a.

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Schneider National, Inc., and ABF Freight System, Inc. are interstate motor carriers of general commodities operating in interstate commerce in Michigan. Schneider National is the parent company of five subsidiary carriers that pay the Michigan SSRS fee implicated in this case. ABF Freight System also pays the Michigan fees. Between them, Schneider National and ABF Freight System have been forced to pay hundreds of thousands of dollars every year as a result of Michigan's interpretation of the statute at issue. Like petitioner Yellow Transportation (formerly known as Yellow Freight System), Schneider National has been forced to bring an action in Michigan state court to recover registration fees that Michigan has imposed over the contrary determination of the ICC. See *Schneider Nat'l Carriers, Inc.* v. *Michigan*, No. 208346 (Mich. Ct. App. May 14, 1999) (unpublished).

STATEMENT

The Intermodal Surface Transportation Efficiency Act ("ISTEA"), enacted by Congress in 1991, specifically directed the Interstate Commerce Commission ("ICC") to prescribe amendments to the existing standards concerning state registration of motor carriers operating in interstate commerce. 49 U.S.C. § 11506(c)(1).[2] One of the substantive provisions Congress ordered the ICC to enforce was a restriction on the imposition by any State of a registration fee higher than the fee the State had "collected or charged" as of November 15, 1991. 49 U.S.C. § 11506(c)(2)(B)(iv)(III).

Following an extensive period of notice and comment, the ICC issued regulations and other interpretations of the statute. *Single State Insurance Registration*, 9 I.C.C.2d 610 (1993). One of those interpretations concerned the effect of reciprocity

[2] For consistency with the opinions below and most of the briefs filed in this Court, we cite the statute's former codification at 49 U.S.C. § 11506, rather than its current recodification at 49 U.S.C. § 14504.

agreements between the States. Agreeing with comments submitted by *amicus* ATA and other motor carrier interests, the ICC determined that States are not permitted to circumvent the congressional freeze on registration fees, or the congressional intent to reduce the burden on motor carriers, by rescinding or otherwise altering reciprocity agreements that had been in effect as of November 15, 1991. Pet. App. 52a-54a. The ICC understood that this result was "required by § 11506(c)(2)(B)(iv)." Pet. App. 54a.

Several States challenged the ICC's conclusions regarding reciprocity agreements, but a unanimous panel of the D.C. Circuit sustained the ICC's interpretation of the statute. *National Ass'n of Reg. Util. Comm'rs* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994) (*NARUC*). The D.C. Circuit concluded that "the Commission was correct" in basing its interpretation on "the plain language of the statute." *Id.* at 729.

In 1990 and 1991, Michigan used a "base-plated" reciprocity system, under which Michigan did not assess fees on any vehicle registered or license-plated in a State that "did not charge Michigan-based carriers a fee." Br. in Opp. App. 3b. In 1991, Michigan changed from base-plated reciprocity to principal-place-of-business reciprocity. Br. in Opp. 3. This shift "was scheduled to become effective in February 1992." Pet. App. 5a. Because of the change in method of determining reciprocity, a particular set of carriers, including *amici* Schneider National and ABF Freight System, no longer qualified for reciprocal fee waivers effective February 1992. Br. in Opp. 5-6. In September 1991, Michigan mailed renewal applications and fee assessments to motor carriers for the 1992 registration year. *Id.* at 5. The 1992 fee assessments were "payable no later than December 31, 1991." *Id.* at 17 n.7.[3]

[3] The assertion in respondents' brief in opposition that payment was due December 31, 1991, is a concession that payment was *not* due before November 15, 1991, the only date to which the statute attaches significance. Therefore, *amici* accept the Decem-

Petitioner returned its application form on October 3, 1991, along with full payment. *Id.* at 6.

In response to a petition by *amicus* ATA, the ICC "instituted a declaratory order proceeding and solicited public comment" on whether certain actions by the States were consistent with the ISTEA. *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184, 1185 (1993). In that proceeding, the ICC addressed "whether the statutory language concerning the 'fee charged or collected as of November 15, 1991' relates to fees charged for the 1991 registration year or for the 1992 registration year," and determined that "the statutory language concerns only fees charged or collected for the 1991 registration year." *Id.* at 1195.

Michigan notified certain companies that it would charge a registration fee for the 1994 registration year (after the ISTEA became effective) to companies that had not paid a registration fee for the 1991 registration year because of reciprocity agreements. One of those companies, petitioner Yellow, brought suit in state court. The state trial and intermediate appellate courts both ruled for Yellow and against Michigan. Both deferred to the views of the ICC, as expressed not only in its rulemaking proceeding, but also in its *ATA* declaratory order proceeding.

The Michigan Supreme Court reversed by a divided vote. According to the majority, "in determining the 'fee * * * collected or charged' under 49 U.S.C. 11506(c)(2)(B)(iv)(III), Michigan's reciprocity agreements are irrelevant" (Pet. App. 3a)

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ber 31 date for purposes of this brief. It appears to *amici*, however, that the date is not in fact correct. "Cab card stamps are issued effective February 1 of the year for which they are issued and expire on January 31 in the succeeding calendar year." Br. in Opp. App. 28b-29b. *Amici* are aware of nothing that required payment by December 31 for a stamp that was not to become effective until more than a month later on February 1.

because "the clear focus of [that provision] is on the generic 'fee' that Michigan charged or collected as of November 15, 1991" (*id.* at 10a).

In opposing the petition for a writ of certiorari, respondents made little effort to defend the rationale of the Michigan Supreme Court. Instead they noted that they billed and Yellow voluntarily paid – before November 15, 1991 – fees that were assessable under a new Michigan policy "scheduled to become effective in February 1992." Pet. App. 5a. Although the ICC had rejected this exact contention in the *ATA* declaratory judgment proceeding, the two lower courts in Michigan had rejected it also, and the Michigan Supreme Court had not reached it, respondents maintained that prepayment before November 15, 1991, of fees due after November 15, 1991, should allow Michigan to charge those fees in perpetuity.

SUMMARY OF ARGUMENT

The ISTEA requires a fee set at the level actually charged as of November 15, 1991, not the level that a State *could have* charged in the absence of a reciprocity agreement. The statute makes no direct reference to reciprocity agreements, but neither does it refer to "generic" fees. Under standard principles of deference to administrative agencies' contemporaneous interpretations reached through formal rulemaking, the ICC's decision not to ignore reciprocity agreements should have prevailed as the authoritative interpretation of the statute, either because that decision comports with the plain language or because the statute is – at worst – silent on the point. Moreover, the ICC's interpretation, unlike the Michigan Supreme Court's, furthers the congressional intent to benefit interstate carriers (and ultimately consumers) by eliminating unnecessary compliance burdens.

Michigan cannot defend the judgment on the ground – not addressed by the Michigan Supreme Court, and rejected by both lower Michigan courts – that respondents billed for and Yellow prepaid an amount not yet due on November 15, 1991. Again,

the language of the statute does not support Michigan's position. Furthermore, neither a State's prebilling of fees not yet due nor the fortuitous circumstances of prepayment should control application of the statute. Rather, Congress intended to freeze "the fees [States] charged *under the former program* as of November 15, 1991." H.R. Conf. Rep. No. 102-404, at 438 (emphasis added). Prebilling or prepayment of fees under a program that was to come into effect on February 1, 1992, should not affect application of the statute. The ICC so determined, and again its interpretation is entitled to deference. A contrary ruling would result in windfall revenue gains to the States, contrary to the purpose of the ISTEA.

ARGUMENT

I. THE TEXT OF THE STATUTE AND THE ICC'S INTERPRETATION OF THE STATUTE REQUIRE THE CONSIDERATION OF RECIPROCAL AGREEMENTS IN DETERMINING THE FEE THAT WAS "COLLECTED OR CHARGED AS OF NOVEMBER 15, 1991"

The text of the ISTEA requires each participating State to charge a fee "that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III). With that language, the statute requires a fee set at the level actually charged as of November 15, 1991, not the level that a State *could have* charged in the absence of a reciprocity agreement. In parallel circumstances, this Court has interpreted a statute whose operative verb form was indicative, rather than subjunctive or conditional, to require an inquiry into actual rather than hypothetical circumstances. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability. A 'disability' exists

only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."). So too here, what fee Michigan "might," "could," or "would" have collected or charged is simply not what the statute's words make important.

The Michigan Supreme Court admitted that a vehicle registration fee "may be waived, and thus not 'charged or collected,' for a particular carrier under a reciprocity agreement." Pet. App. 10a. Having admitted that the statutory language required recognition that reciprocity agreements *do* affect the fees "charged or collected," however, the court proceeded in the same sentence and the next one to announce – *ipse dixit* – that "such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. § 11506(c)(2)(B)(iv)(III) is on the generic 'fee' that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier." Pet. App. 10a. Although "generic" is not a term that appears in the statute, the court perceived the ICC – not itself – to have "added a concept not within the express language of the statute" because the ICC had "consider[ed] * * * voluntary agreements between the states to waive or reduce the fees imposed." *Id.* at 10a-11a.

Of course, it was the ICC that paid attention to the language of the statute, freezing fee levels at those "collected or charged as of November 15, 1991," without regard to whether non-collection or waiver of charges resulted from "generic" fee setting or reciprocity agreements. It was the Michigan Supreme Court that, in its own words, "added a concept" – "generic" fees – "not within the express language of the statute." Purely as a matter of statutory language, it is hard not to agree with the D.C. Circuit that "the plain language of the statute precludes [the Michigan Supreme Court's] interpretation." *NARUC*, 41 F.3d at 729.

But there are other things besides statutory language that make the Michigan Supreme Court's conclusion utterly indefensible. Under the rules of judicial deference to administrative determinations set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), the fact that Congress has directed the ICC to promulgate rules implementing the relevant portion of the ISTEA is a particularly weighty reason to defer to the agency. In this situation, agency interpretations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

In *United States* v. *Mead Corp.*, this Court reaffirmed the *Chevron* framework. 533 U.S. 218, 227-28 (2001). This Court stated that one "very good indicator" of congressional delegation is an "express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229. The Court continued, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

In this case, Congress explicitly entrusted interpretation of the statute to the ICC. Congress specifically directed the ICC to prescribe standards under which motor carriers would be required to register annually with only one State and such single state registration would be deemed to satisfy the registration standards of all other States. 49 U.S.C. § 11506(c)(1). It further specified that the ICC's standards "shall establish a fee system for the filing of proof of insurance [that] * * * will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III).

The ICC arrived at its interpretation of the ISTEA only after completing an extensive notice-and-comment period. See

Pet. App. 83a-84a (listing commentors). The ICC concluded that both "the letter of the law" and "the intent of the law" compel the conclusion that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991." *Id.* at 53a, 54a.

The ICC's interpretation of the ISTEA was subject to even further administrative consideration. After certain States ignored the ICC's final ruling, *amicus* ATA was forced to bring a petition for a declaratory order before the ICC. See *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993). In that proceeding, the ICC once again reviewed its determination, and it decided to "reaffirm" its "prior conclusion" that "[t]he language of the statute is clear": it is inconsistent with the statute for a State to renounce or modify a reciprocity agreement so as to alter any fee charged or collected as of November 15, 1991, under the predecessor registration system. *Id.* at 1194.

The most charitable possible reading of the statute is that it refers to *neither* "generic fees" (a term the Michigan Supreme Court would read into the statute) *nor* voluntary agreements between the States to waive or reduce the fees imposed (a term the Michigan Supreme Court believes the ICC read into the statute). Read in such a charitable fashion, the statute could be deemed silent on the question presented in this case. But that, too, would be fatal to the position of the Michigan Supreme Court. For "such silence, after all, normally creates ambiguity. It does not resolve it." *Barnhart* v. *Walton*, No. 00-1937, 2002 WL 459209, at *5 (U.S. Mar. 27, 2002) (slip op. 5). And in such circumstances of ambiguity the courts may not substitute their interpretations for permissible agency interpretations. *Ibid.*; *Edelman* v. *Lynchburg College*, 70 U.S.L.W. 4198, 4203 (U.S. Mar. 19, 2002) (O'Connor, J., concurring in the judgment) (slip op. 3).

There are additional reasons to defer to the ICC's reasonable interpretation of the statutory language rather than accept the Michigan Supreme Court's *ipse dixit* that the *only* way to read the statute is that court's. For one thing, the ICC's interpretation was adopted in the statutorily mandated rulemaking *immediately* after the statute was passed, and thus is – within the context of this statutory scheme – a longstanding interpretation. The longstanding nature of the agency's interpretation in this case entitles it to particular deference. *Walton*, 2002 WL 459209, at *5 (slip op. 7); *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984) (*Alcoa*); *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 522 n.12 (1982).[4]

Furthermore, the ICC's interpretation of the statute is consistent with the congressional statement that the single state registration system "is intended to benefit the interstate carriers by eliminating unnecessary compliance burdens" and "ultimately, consumers will also benefit from the cost savings associated with the elimination of the [prior] program." H.R. Conf. Rep. No. 102-404, at 437 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. Congress wished to protect against

[4] This Court gave "particular force" to a longstanding administrative interpretation in *Alcoa*, 467 U.S. at 390, the very same month it decided *Chevron*. The most often cited pages of *Chevron*, 467 U.S. at 842-44, are full of footnotes (*id.* at 842-44 nn.9 & 11-14) citing some 27 prior decisions of the Court, dating back as far as 1827, in support of the deference principles the Court announced in *Chevron*. Among the decisions the Court cited as an unbroken string of precedent requiring the principles announced in *Chevron* was *Alcoa*. See 467 U.S. at 844 n.14. The Court concluded the relevant part of its opinion by declaring that the court of appeals had erred "[i]n light of these well-settled principles." 467 U.S. at 845. The principle of particular deference to longstanding agency interpretations is supported by *Chevron*'s predecessors, its contemporaries, and its descendants.

a *diminution* in state revenues,[5] but it understood that allowing States to *increase* revenues over prior levels would result in a burden on interstate commerce. The ISTEA contains a declaration to that exact effect. See 49 U.S.C. § 11506(c)(2)(C) (Pet. App. 101a); see also Pet. App. 53a-54a (ICC's determination that Congress's intent was "that the flow of revenue for the States be maintained while the burden of the system for carriers be reduced").

As *amicus* ATA argued before the ICC, see Pet. App. 53a, rescission of reciprocity agreements would allow States to increase per-vehicle fees quite substantially. If all 39 States eligible to participate in the Single State Registration System had adopted the "generic fee" rule of the Michigan Supreme Court, then even back in 1993 State revenues could have increased fourfold, from $50 million to $200 million. *Ibid.* And, as the Solicitor General pointed out at the petition stage, "[t]he number of vehicles potentially subject to fees under the Single State Registration System has more than doubled since the ICC's rulemaking, and the potential aggregate fee increase therefore has increased proportionately." U.S. Amicus Br. 11 (filed Jan. 2, 2002).

Such a rescission of reciprocity agreements would mean windfall gains to States. Pet. App. 54. Contrary to congressional intent, it would result in added burdens on motor carriers and prevent a corresponding benefit to consumers from the pass-through of cost savings. For this reason, the ICC's "interpretation makes considerable sense in terms of the statute's basic objectives," *Walton*, 2002 WL 459209, at *5 (slip op. 6), and thus is to be preferred over the Michigan Supreme Court's contrary interpretation.

[5] For a description of the legislative compromise that protected States' revenues while also reducing carriers' costs through a streamlined registration system, see *NARUC*, 41 F.3d at 724; U.S. Amicus Br. 10 n.1 (filed Jan. 2, 2002).

II. EARLY PAYMENT, UNDER A FEE SYSTEM NOT IN EFFECT, SHOULD NOT BE CONSIDERED "COLLECTED OR CHARGED AS OF NOVEMBER 15, 1991"

Arguing against a writ of certiorari, respondents took the position that the State of Michigan's "actions are lawful" because the State "charged and collected the challenged $10 per vehicle fee from Petitioner prior to November 15, 1991." Br. in Opp. 8; see also *id.* at 12. Because respondents billed for and Yellow paid an amount not yet due on November 15, 1991, the State argues, "the result in this case would be the same regardless of how the [reciprocity] conflict is decided." *Id.* at 7.

Although this Court has limited the question presented in this case in a way that may be read to exclude this issue from consideration, *amici* are not allowed a reply brief and cannot await respondents' brief on the merits to determine whether respondents will continue to press this defense of the judgment below on alternative grounds. This issue, no less than the issue addressed above, is of vital interest to *amici*, so we will address the State's argument here.

It is not clear which pre-November 15 event drives the State's proposed alternative construction. At times, the State seems to attach significance to the mere mailing of an invoice. *E.g.*, Br. in Opp. 17 n.7 ("[T]he 1992 fee renewal applications * * * were mailed to all interstate carriers in September 1991 and were payable no later than December 31, 1991. *Accordingly*, the $10.00 registration fee was charged prior to November 15, 1991.") (emphasis added). At other times, the State seems to attach significance to the happenstance of Yellow's early payment of 1992 fees in October 1991. *E.g.*, Br. in Opp. 20 ("Michigan actually collected $10 per vehicle from Yellow Freight before November 15, 1991, and without protest."). Yet a footnote in the brief in opposition reflects evident discomfort at reliance on that happenstance. *Id.* at 17 n.7 ("Thus, Michigan charged Yellow Freight the $10.00 fee per vehicle under the

SSRS because that is the fee that Michigan was charging prior to November 15, 1991 not because Yellow Freight purchased its stamps early."). Whichever of those positions respondents mean to adopt, their position is wrong. Given the statutory language, the statutory purposes, and the ICC's interpretation of the ISTEA, basing the new fee system on a fee assessment mailed *or* an early payment made under a reciprocity system that did not become effective until February 1992 does not comply with the fee system mandated by the ISTEA.

Michigan's improper reading of the statute would allow fortuitous or evasive actions to determine the level of fees under the new fee system. Respondents argue that the State "collected" the higher fee from petitioner as of November 15, 1991. Br. in Opp. 8. That "collection" was purely fortuitous. The fee assessment sent by the State was not due until December 31, 1991 (or January 31, 1992). Pet. App. 17 n.7; note 3, *supra*. If petitioner's accounting department waited until the due date to pay the assessment or if the payment got lost in the mail, then, under respondents' interpretation, the State would not have "collected" the higher fee as of November 15, 1991. Similarly, respondents' reading of "charged" would allow States to engage in evasive behavior merely to raise the level of permissible fees and dodge the congressional intention that the new system result in "cost savings" to the motor carriers. H.R. Conf. Rep. No. 102-404, at 437 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1817. For example, in anticipation of congressional action, States could have changed their fee schedules prospectively and mailed out fee assessments for anticipated future fees not yet in effect and not scheduled to be in effect for some time. Under respondents' reading (or at least the reading respondents advance at some places in their brief in opposition), the mere mailing of those fee assessments would be sufficient to establish a new fee level.

A better reading of the statute is that this language freezes the fee system *in effect* as of November 15, 1991. This interpretation gives meaning to the November 15, 1991, date

and freezes fees according to the fee system in place, not the random or evasive actions of motor carriers or the States. Moreover, this reading of the statute conforms with congressional intent. Explaining the new fee system, the House Conference Report stated, "States will not be allowed to charge a greater fee * * * than the fee they charged *under the former program* as of November 15, 1991." H.R. Conf. Rep. No. 102-404, at 438, *reprinted in* 1991 U.S.C.C.A.N. at 1818 (emphasis added). The words "under the former program as of November 15, 1991" demonstrate that Congress intended to freeze the fees charged under the program in effect as of November 15, 1991.[6]

Michigan did not require motor carriers operating Illinois-plated vehicles in the State on November 15, 1991, to pay a registration fee in order to operate in the State on that date. See Br. in Opp. App. 3b. An Illinois-plated truck newly put into service on Michigan's roads on November 1, 1991, for example, had absolutely no obligation to pay $10 to Michigan for the privilege of operating through November 15, 1991 (and indeed could obtain without fee a stamp authorizing it to operate in Michigan through January 31, 1992, *id.* at 28b-29b). The disputed fee in this case was charged and collected pursuant to an agreement that was not effective until February 1992. Pet. App. 5a. The Court should not consider fees charged or payments collected pursuant to an agreement not in effect on November 15, 1991. As the Michigan Court of Appeals stated, the "voluntary payment of fees not due and owing does not affect [the] analysis" of this issue. Pet. App. 28a.

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[6] The ICC decision provides additional support for this interpretation. In examining the impact of reciprocity agreements on the fee charged or collected as of November 15, 1991, the ICC agreed with *amicus* ATA that the fee should be set according to "the terms of [reciprocity] agreements *in effect* as of November 15, 1991." Pet. App. 53a (emphasis added).

The Michigan Court of Appeals further stated, "Congress' intent concerning the allowable fee levels is not clear with respect to the pertinent period for fixing the fee levels." *Ibid.* As the court noted, "the statute is silent regarding when the period begins. One could argue a state that had charged or collected fees from a carrier in any year before 1991 was entitled to continue to collect the fees under the SSRS. On the other hand, one could conclude, as the ICC did, that the relevant period was the registration year that included November 15, 1991." *Ibid.* That analysis is, if anything, overly favorable to the State: as petitioner demonstrates, the language of the statute is more naturally read to refer to fees that affected a carrier's right to operate in a State on November 15, 1991, not to prebillings or prepayments. In any event, the statute is at worst ambiguous. Under the *Chevron* framework, courts should defer to the agency's interpretation of ambiguous statutory language.

Again, it is important that Congress in the ISTEA instructed the ICC to implement the statute through rules. *Chevron*, 467 U.S. at 842-45; *Mead*, 533 U.S. at 227-30. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. In this case, the ICC's construction of the ISTEA, which followed a notice-and-comment period, is entitled to such deference.

In the *ATA* declaratory order proceeding, petitioner Yellow asked the ICC to consider "whether the statutory language concerning the fee charged on November 15, 1991, relates to fees charged for the 1991 registration year or the 1992 registration year." *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Registration*, 9 I.C.C.2d 1184, 1192 (1993). Petitioner argued that "the focus of the statute is on the 1991 registration year and that the fee for 1992 is not germane." *Ibid.* The ICC determined, "We think it clear that the statutory language concerns only fees charged

or collected for the 1991 registration year, and we so find." *Id.* at 1195.

Of course, the statute refers to a specific date – November 15, 1991 – rather than to a whole calendar year, and the specificity of the date should be given some effect. But the ICC's interpretation, though perhaps phrased in shorthand, does exactly that. Fees charged pursuant to an agreement or other law or regulation *in effect* on November 15, 1991, or *allowing vehicles to travel on the taxing State's roads* on November 15, 1991, may be charged under the ISTEA. But fees that had no legal effect on November 15 – and merely were billed but not yet due, or merely happen to have been received before November 15 pursuant to agreements *not* in effect on November 15 – may not be charged under the ISTEA.

Whether or not this is the only possible reading of the statute (which of course does not in terms contemplate demands for or the voluntary prepayment of fees not yet due and owing), it surely is a reasonable, and hence permissible, one. "The statute's complexity, the vast number of [trucks and trucking companies it affects], and the consequent need for agency expertise and experience [should] lead [the Court] to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration." *Walton*, 2002 WL 459209, at *9 (slip op. 13). If ever there was a "matter[] of detail" suitable for agency decisionmaking, this is it, all the more so because the agency's interpretation is consistent with the statute's purpose to keep in check the burden of fees on interstate commerce.

A ruling for the State on this ground, no less than a ruling for the State on the ground that reciprocity agreements are "irrelevant" (Pet. App. 3a), would have the result that "States could realize windfall revenue gains" (Pet. App. 53a). Indeed, although the ICC used the term "windfall" in connection with ignoring reciprocity agreements, it is even more applicable to respondents' alternative argument, which would make the

application of the statute turn on whether a State demanded, or a particular carrier paid, its 1992 fee more, or less, than 47 days before the claimed due date of December 31, 1991. See also note 3, *supra*. Nothing in the statute so plainly requires that result as to deprive the ICC of the usual deference. As the lower Michigan courts concluded (and the Michigan Supreme Court did not dispute), respondents should lose on this issue as well as on the principal issue on which the Court granted certiorari.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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APRIL 2002